Supreme Court, U.S.
FILED

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No. 94-___ 931573 APR 4 1994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

OFFICE OF THE CLERK

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Petitioners,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit And Request For Summary Reversal

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a trial court or Court of Appeals grant or affirm a motion for summary judgment *sua sponte*, or on grounds not plead in the motion? If so, under what circumstances?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Ronald E. Chamness

Rhea Ann Chamness

William R. Trione

Alinda Hill Wikert ("Wikert")

Deposit Insurance Bridge Bank, N.A.

Oregon, Inc.

Bank One, N.A.

Federal Deposit Insurance Corporation ("FDIC")

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS BY OTHER COURTS

Case Below:

Chamness v. Federal Deposit Insurance Corp., No. 93-1486, (5th Cir. Nov. 17, 1993), (reh'g. denied Jan. 4, 1994). [Unpublished] *Chamness v. Federal Deposit Insurance Corp.*, No. 3:CV-89-1117-P, (N.D. Tex. April 29, 1993) [Unpublished]

STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT IS BASED

Judgment of the Court of Appeals below was enter November 17, 1993.

Appellants timely filed a Petition for Rehearing by the Court of Appeals on November 30, 1993. Appellants Petition for Rehearing was denied on January 4, 1994. Petition for Certiorari is sought within ninety (90) days of entry of a mandate denying a Petition for Rehearing by a Court of Appeals giving jurisdiction under 28 U.S.C. § 1254(2) and Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

United States Constitution Amendment V

"[No person shall]... be deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 56(b)

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Federal Rule of Civil Procedure 56(c)

> The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE FACTS OF THE CASE

Ronald E. Chamness and Rhea Ann Chamness ("Chamness") claimed in the trial court that certain liens granted to a bank were invalid, because the liens purported to encumber the Chamness' homestead, which is illegal in the State of Texas. The bank failed. The FDIC, in its capacity as receiver for the failed bank, filed a Motion for Summary Judgment based upon the doctrine of *D'Oench-Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). A co-defendant, who purchased the property at the foreclosure of the liens, did not file a Motion for Summary Judgment. The Court of Appeals did not reach the question of whether the Motion for Summary Judgment was properly granted on the grounds found by the District Court, i.e. *D'Oench-Duhme*, 12 U.S.C. § 1823(e) and sanctions under Fed. R. Civ. P. 16. The Court of Appeals ruled instead, that the Motion for Summary Judgment should be granted on an entirely new and unplead legal theory of estoppel to claim homestead. In addition, the Court of Appeals affirmed the grant of summary judgment in favor of the co-party who did NOT FILE a motion for summary judgment.

BASIS OF JURISDICTION IN THE COURT OF APPEALS

Petitioners presented a Final Order of the District Court to the Court of Appeals, giving the Court of Appeals jurisdiction under 28 U.S.C. § 158(d).

REASONS FOR GRANTING WRIT OF CERTIORARI

A. LACK OF UNIFORMITY IN CIRCUIT COURTS.

THE COURTS OF APPEAL HAVE ESTABLISHED UNCERTAIN AND INCONSISTENT STANDARDS FOR THE AFFIRMANCE OF SUMMARY JUDGMENT ON GROUNDS DIFFERENT FROM THOSE RELIED UPON AND PLEAD BY THE PARTY MOVING FOR SUMMARY JUDGMENT.

There are various and conflicting standard enunciated by the various Courts of Appeal regarding the standards for affirming a summary judgment on grounds different from those relied upon by the movant. Wikert, in her Response to Appellants' Petition for Rehearing, cited cases from each Circuit Court of Appeals in support of the general proposition that the Court may affirm a grant of summary judgment on grounds other than those stated by the District Court. The cases and the standard enunciated in each case are as follows:

1. *Chamberlain v 101 Realty*, 915 F.2d 777, 783 n.8 (1st Cir. 1990)

   We are, of course, free to affirm a district court's decision "on any ground supported by the record even if the issue is not pleaded, tried or otherwise referred to in the proceedings below." *Citing Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1151-52 (1st Cir. 1989).

2. *Alferro Motor Company, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)

Although the District Court based its dismissal of the complaint on other grounds, we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon the district court.

3. *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3rd Cir. 1985).

An Appellate Court may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment.

4. *Keith v. Aldridge*, 900 F.2d 737, 739 (4th Cir. 1990)

In doing so, we apply the summary judgment principals applicable in the district court, but are not bound to particular theories relied upon by that court.

5. *Barnhart v. Richardson Merrill*, 892 F.2d 440,444 (5th Cir. 1990).

We may affirm a grant of summary judgment on grounds other than those stated by the trial court.

6. *Hooks v. Hooks*, 771 F.2d 935, 945 (6th Circuit 1985).

However, this Court may examine the record and affirm the District Court on other grounds if we determine their is no material controversy regarding matters of fact or law.

7. *Sally Beauty Company v. Nexus Products Company, Inc.*, 801 F.2d 1001, 1005 (7th Cir. 1986).

We may affirm this summary judgment, however, on a different ground if it finds support in the record.

8. *Lane v. Peterson*, 899 F.2d 737, 743 (8th Circuit 1990).

We may affirm a judgment on any grounds support ed by the record, even if not relied on by the District Court.

9. *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1437 (9th Cir. 1986).

> We may affirm the district court on a ground not selected by the district court judge, so long as the record fairly supports such an alternative disposition of the issue.

10. *Bath v. National Association of Intercollegiate Athletes*, 843 F.2d 1315, 1317 (10th Cir. 1986).

> While it is true that we can affirm on any grounds that find support in the record..., even where the lower court reach its conclusions from a different or even erroneous course of reasoning...we decline to do so under the facts of this case. Had the district court intended to review count V on its merits, we might also be inclined to determine the validity of the cause of action under the prevailing law. The district court expressly avoided any such dertermination, however, and we do not believe that under these facts, the substance of plaintiff's claim should be examined for the first time on appeal. Moreover, we do not have a complete record on the existence of diversity jurisdiction.

11. *Estate of Whitt v. C.I.R.*, 751 F.2d 1548, 1558 (11th Cir. 1985).

> Where, the factual findings permit us to affirm on an alternative ground, we may do so, at least in the absence of prejudice.

These enunciations of a general standard stand in marked contrast to the more specific discussion and criticism of the practice in other Courts of Appeal decisions. The split of authority and lack of clarity between the circuits is illustrated by the 5th Circuit Court of Appeals in *Federal Deposit Insurance Company v. Laguarta*, 939 F.2d 1231, 1241 n.20 (5th Cir. 1991), cited below by the FDIC.

> At least three circuits have indicated that a summary judgment generally should not be affirmed on grounds that were neither raised nor relied on below.

The Court of Appeals in *Laguarta*, in footnote 20 refers to the following three cases which conflict with the general discussion contained in the cases cited by Wikert.

> To be sure, appellate courts must tread cautiously over terrain that the parties have failed to explore on appeal. Any issue injected into the appeal by the court itself must have been adequately presented below, and the parties must have had a full opportunity to develop the relevant facts. *Heirs of Fruge v Blood Services* 506 F.2d 841, 844 n.2 (5th Cir. 1975). In addition, the Appellate Court should have the benefit of thorough briefing before considering a decisive issue or rational.

Arlinghaus v. Rittenhour, 622 F.2d 629, 638 (2d Cir. 1980).

The 4th Circuit Court of Appeals clarified that although they are not bound to consider only those specific grounds upon which the district court based its summary judgment, the alternative ground must have been raised at the District Court:

> At least any alternative grounds that have been presented both to the district court and on appeal so that the nonmoving party has had fair opportunity to contest at both levels, thereby, avoiding the vexed problem of raising new issues or theories on appeal. See 10 *Wright and Miller* supra § 2716 at 345 through 346.

Charvonnages DeFrance v. Smith, 592 F.2d 406, 416 n.9 (4th Cir. 1978).

In a parallel situation, the District of Columbia Circuit has made the following ruling in evaluating whether an Appellate Court can consider new issues regarding a 12(B)6 Motion which has been considered by a district court as a motion for summary judgment:

> Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment on a new issue raised sua sponte on appeal.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984)

> When the parties have not even been notified that an issue will be considered by the court at the only point when they may submit factual affidavits—the trial level - then there is every likelihood that they have been denied the full opportunity to present the applicable facts.

Ramirez de Arellano v. Weinberger, at 1537.

What is astounding about the facts before this Court is that the new, unplead and independent legal theory relied upon by the Fifth Circuit Court of Appeals in affirming summary judgment in favor of the FDIC, also affirms summary judgment in favor of Wikert, who had not even filed a motion for summary judgment.

There is no consistency among the circuit courts of appeals, nor is there consistency within the circuits themselves, concerning when a Court may *sua sponte* grant summary judgment, or affirm on grounds not raised in the motion. This Court ruled in 1949 that it was improper for a court of appeals to grant summary judgment in the absence of fair opportunity for a non-movant to set forth grounds for denying the motion for summary judgment. *Fountain v.*

Filson, 337 U.S. 921, 69 S.Ct. 1153 (1949).[1]

It is essential for the purposes of judicial economy, and for preservation of the due process rights of the litigants, for this Court to enunciate a consistent standard under which a court may grant, or affirm, a motion for summary judgment on grounds other than those stated in the motion, and to clarify under what circumstances a court may render summary judgment *sua sponte*. In the absence of such a definitive rule, unnecessary time and resources will be spent by non-movants in summary judgment proceedings to refute factual theories which are not germane to the grounds contained in a motion for summary judgment. Alternatively, non-movants will be forced to dispute legal theories which are not germane to the grounds raised in the motion for summary judgment. Litigants are entitled to know whether they must raise fact issues with regard to every conceivable legal theory which is arguable, based on a summary judgment record.

The practical nature of the dilemma presented by this legal issue is illustrated by the following:

In the case at bar, the facts necessary to invoke the legal defenses of *D'Oench-Duhme* and 12 U.S.C. § 1823(e) to Chamness homestead claim were simple:

1. a representation was made, and; (Fact 1)
2. the bank to whom it was made failed (Fact 2).

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[1] In *Stiles v. RTC*, 867 S.W.2d 24 (Tex. 1993), the Texas Supreme Court addressed the problem and prohibited the practice of affirming summary judgment on grounds not plead at the trial court level.

The legal premise of the Motion was that given Fact 1 and Fact 2, a borrower could not assert a claim or defense inconsistent with the representation established by Fact 1. Since Facts 1 and 2 were not disputed, no controverting affidavits were filed by the non-movant petitions.

The Court of Appeals, however, affirmed the Summary Judgment on the new and unplead theory of estoppel to claim homestead. The theory of estoppel to claim homestead requires the establishment of Fact 1, but is further predicated on several facts not established in this case:

Non-established Fact 1:	that the Petitioner was not in possession of the claimed homestead;
Non-established Fact 2:	that the Bank believed and relied on the representation of the homestead claimant; and
Non-established Fact 3:	that the Petitioner was in possession of another property.

Had the Non-Movant Petitioners known that every legal theory in the universe of potential and unplead legal theories needed to be refuted, they could, and indeed would have refuted non-established facts 1, 2 and 3. Petitioners did not and could not, and attempting to do so would be to attempt a fool's errand.

Litigants are entitled to know the legal theories of their opponents. A party resisting summary judgment should not be required to anticipate and/or rebut each and every imaginable legal theory that a trial Court or Court of Appeals believes is applicable to a summary judgment record.

The Respondents will no doubt continue their argument that it is well settled that the Court of Appeals may affirm a District Court's Judgment on any plead or unplead legal ground. This argument ignores the following problems, however, such a practice poses by denying notice and due process to the non-movant.

There is no authority for a Court of Appeals to affirm summary judgment in favor of a party not moving for summary judgment on grounds not presented or argued by the party moving for summary judgment. This unorthodox procedure is a violation of the Petitioners rights under the Fifth Amendment of the United States Constitution.

The holdings relied on by Respondents are inconsistent and do not enunciate, articulate, or reasonably guide practitioners as to when and under what circumstances courts of appeals may affirm summary judgment on grounds not raised or argued before the trial court.

Petitioners pray the Court grant this Petition and after hearing, reaffirm and expand the sound logic in *Fountain v. Filson*, and require the Courts of Appeal and Trial Courts abandon the practice of entertaining non-existent or imaginary motions.

B. DENIAL OF DUE PROCESS

IT IS A DENIAL OF DUE PROCESS FOR THE COURTS OF APPEAL TO AFFIRM SUMMARY JUDGMENTS IN FAVOR OF A NON-MOVING PARTY ON GROUNDS DIFFERENT FROM THOSE PLEAD OR RAISED BY A MOVING CO-PARTY, BECAUSE THE PRACTICE DEPRIVES THE ADVERSELY AFFECTED PARTY OF AN OPPORTUNITY TO PRESENT SUMMARY JUDGMENT EVIDENCE ON THOSE ISSUES.

The Federal Rules of Civil Procedure do not discuss the criteria for courts to apply in granting a motion for summary judgment *sua sponte* or on grounds different from those stated in the movant's pleadings. These criteria have, apparently, been developed by the various courts of appeal as outlined above. The deprivation of the opportunity to present opposing summary judgment evidence in response to specific legal theories results in a de facto denial of procedural due process.

> Procedural due process imposes restraints on governmental decisions which deprive individuals of liberty or property within the meaning of the due process clause of the 5th or 14th Amendment.

Mathews v. Eldridge, 424 U.S. 319 (1975) (Brennen, J. Marshall, J., dissenting)

> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Mathews v. Eldridge, at 902.

To render judgment that a plaintiff take nothing based upon a legal theory not raised by the pleadings of the moving party, and in addition, to render judgment in favor of a co-

party who did not move for a summary judgment at all, clearly deprives the plaintiff of meaningful opportunity to be heard.

The unfair nature of this lack of procedural due process invites abuse. A movant in a summary judgment motion could purposefully avoid mention of a legal theory which is supported by facts it knows can be disputed, with the hope that a law clerk, district judge, or appellate court would raise, *sua sponte*, this legal argument never considered by the party resisting summary judgment and, therefore, not rebutted. Once the case is on appeal, the movant simply springs the trap and argues a new legal theory for the first time on the authorities cited herein, or even on the basis of harmless error. Since the fact controverting stage in the litigation has passed, the summary judgment opponent's fate is sealed.

Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioners pray the Court grant the Writ of Certiorari and, upon review of the decision below, summarily reverse the judgment of the United States Court of Appeals for the Fifth Circuit and direct that Court to remand the case to the United States District Court for a trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

APPENDIX

A. Opinion of Fifth Circuit Court of Appeals

B. Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

C. Motion for Partial Summary Judgment

D. District Court Memorandum Opinion and Order

E. District Court Judgment

App. A

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 93-1486
Summary Calendar

RONALD E. CHAMNESS, ET AL.,
Plaintiffs,
RONALD E. CHAMNESS and RHEA ANN CHAMNESS,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Dallas, N.A.,
DEPOSIT INSURANCE BRIDGE BANK, N.A.,
OREGON, INC., WILLIAM R. TRIONE, and
ALINDA HILL WIKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(3:89-CV-1117-P)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Ronald Chamness and wife Rhea Chamness appeal summary judgment and dismissal of their suit against the Federal Deposit Insurance Corp. ("FDIC"), MBank Dallas, N.A. ("MBank"), Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"), Oregon, Inc., William Trione and Linda Wikert. We affirm.

I.

A.

During 1979, Ronald Chamness and his late wife, Marlene Chamness, lived in, and claimed as their homestead, a house located at 6550 Cliffbrook in Dallas, Texas (the "Cliffbrook homestead"). In 1979, at a time when they still lived at the Cliffbrook homestead, they purchased a house located at 4208 Armstrong Parkway, Highland Park, Texas (the "Armstrong property"). They immediately began renovating the Armstrong property, during which time it was not occupied. Shortly thereafter, Marlene Chamness died.

In 1980, while still living in the Cliffbrook homestead, Ronald Chamness obtained a $1 million loan secured by a deed of trust covering the Armstrong property in order to renovate it. To obtain the loan, Chamness executed a home-

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should no t be published.

stead affidavit stating that the Armstrong property "does not constitute any part of [Chamness's] business or urban homestead, and the [Armstrong property] is not claimed . . . as homestead property." In 1981, Chamness sold the Cliffbrook homestead and thereafter claimed his Cedar Creek lake house in Henderson County, Texas, as his homestead.

Chamness borrowed an additional $1.5 million and $937,500 from Republic National Bank of Dallas to renovate the Armstrong property; both loans were secured by a deed of trust to the property. Chamness also signed two homestead affidavits and a subordination agreement.

The loans were moved to First City Bank of Dallas and eventually assigned to MBank in March 1985. Chamness signed an additional homestead affidavit disclaiming the Armstrong property as a homestead. He defaulted on the promissory note, and MBank requested Trione, the trustee of the deed of trust, to foreclose. After foreclosure, the Armstrong property then was sold to Oregon, Inc., which conveyed title to Wikert.

B.

In 1988, Chamness, his second wife, Rhea, and his children filed suit in state court against MBank, Oregon, Inc., Trione, and Wikert, claiming that Chamness was the fee simple owner of the Armstrong property and that it was his

homestead and therefore improperly subjected to foreclosure.[1] MBank filed a counterclaim against Ronald Chamness for common law fraud and for collection on the notes on the Armstrong property. In 1989, the suit was removed to federal court.

C.

During the course of the lawsuit, the plaintiffs objected to and/or failed to respond to several discovery requests after obtaining various extensions of time. In October 1989, the FDIC[2] filed its first motion to compel production of certain documents. In December 1989, the FDIC, Bank One, and Trione filed a motion for summary judgment.[3] After six motions for extensions by the plaintiffs, the FDIC filed a motion for sanctions pursuant to Fed. R. Civ. P. 37 based upon the plaintiffs' failure to produce documents. The plaintiffs failed to respond to this motion.

In June 1990, the FDIC filed a Fed. R. Civ. P. 16(f) motion for sanctions, seeking dismissal based upon the plaintiffs' failure to cooperate in the filing of a joint pretrial order. Because of confusion concerning the plaintiffs' legal representation, no response to the rule 16(f) motion was filed.

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[1] Rhea Chamness was included as a plaintiff because she claimed a marital interest in the property; Ronald Chamness's children claimed and interest in the property under their late mother's will.

[2] The FDIC became receiver of MBank in the spring of 1989.

[3] Because Bank One's counterclaim against Ronald Chamness was still pending, the motion was titled "Motion for Partial Summary Judgment."

In August 1990, the district court entered a memorandum opinion granting summary judgment, holding that the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. § 1823(e) barred the plaintiffs' homestead claims. Since the plaintiffs had failed to respond to the summary judgment motion, the court accepted as true the defendants' factual allegations. The court also granted the FDIC's motion for sanctions, including dismissal of plaintiffs' claims. In April 1993, the court entered its final order of summary judgment and sanctions.

II.

A.

We review a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

The plaintiffs failed to respond to the summary judgment motion, despite repeated extensions of time. In such cases, we must assume as true the facts alleged by the moving party. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1980). Furthermore, we may affirm a grant of summary judgment on grounds other than those stated by the district court. Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990).

We agree with the district court that the homestead claims asserted by the plaintiffs were barred under Texas homestead law, which provides that a claimant has no homestead protection if he represents that the property is not his homestead at a time when he is not actually occupying the property. Even if a claimant intends to use the property as a homestead, he will be estopped by any disclaimers executed before actual use of that homestead. Miles Homes, Inc. v. Brubaker, 649 S.W.2d 791. 793 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.). Accord Patterson v. FDIC, 918 F.2d 540, 547 (5th Cir. 1990).

B.

As we reasoned in a similar recent case, "[Because] Texas law bars the Plaintiff's defense to payment, we find that it is unnecessary to reach the question whether Plaintiff's defense to payment would be barred by D'Oench, Duhme or § 1823(e)." Wiltfang v. FDIC, No. 92-4811, 1993 U.S. App. LEXIS 23605 (5th Cir. Aug. 10, 1993) (per curiam)

(unpublished). We also need not consider whether the district court was correct in dismissing plaintiffs' claim as a sanction for discovery abuse. As we have explained, under Texas law the plaintiffs had absolutely no legitimate homestead claim. Accordingly, they are entitled to no recovery, and dismissed on that ground alone would have been appropriate.

The judgment is AFFIRMED.

App. B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1486

RONALD E. CHAMNESS, ET AL.,
Plaintiffs,
RONALD E. CHAMNESS and RHEA ANN CHAMNESS,
Plaintiffs-Appellants,

Versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Dallas, N.A., ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the
Northern Disrict of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 11/17/93, 5 Cir., 1993, F.3d ( )

(January 4, 1994)
Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF THE
MANDATE

App. C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS,
RHEA ANN CHAMNESS,
LISA C. CHAMNESS,
RONALD E. CHAMNESS, JR.
AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
FOR MBANK DALLAS, N.A.,
OREGON, INC., WILLIAM R.
TRIONE AND ALINDA HILL WIKERT

Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC"), as Receiver for MBANK DALLAS, N.A., BANK ONE, TEXAS, N.A. ("BANK ONE") and WILLIAM R. TRIONE ("TRIONE") move this Court, pursuant to Fed. R. Civ. P. 56 for Partial Summary Judgment[1], and in support thereof would show the Court the following:

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[1] As there is pending a counterclaim by BANK ONE against Plaintiff Ronald E. Chamness, this is a Motion for Partial Summary Judgment as to all of PLAINTIFFS' claims against the moving parties, and would not dispose of BANK ONE's pending counterclaim.

I. INTRODUCTION.

1. On June 2, 1988, Plaintiffs Ronald E. Chamness, Rhea Ann Chamness, Lisa C. Chamness, Ronald E. Chamness, Jr., and Holly A. Chamness ("Plaintiffs") filed their Original Petition ("Petition") against MBank Dallas, N.A. ("MBank") in the 134th Judicial District Court, Dallas County, Texas, Cause No. 33-6940-G. MBank answered by filing a general denial on or about June 24, 1988.

2. On March 28, 1989, the Comptroller of the Currency declared MBank insolvent pursuant to 12 U.S.C. § 191 (1988). On that same date, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for MBank pursuant to 12 U.S.C. § 1821(c)(1988).

3. On April 27, 1989, the FDIC, in its capacity as Receiver of MBank, and Deposit Insurance Bridge Bank, N.A. ("DIBB") intervened as parties Defendant in the state court proceeding, and FDIC and DIBB removed this action to this Court pursuant to 12 U.S.C. §1819(Fourth) (1988).

4. Subsequent to the removal of the case to this Court, DIBB changed its name to Bank One.

5. FDIC's, Bank One's, and Trione's Motion for Summary Judgment embraces Plaintiffs' entire claims against FDIC, Bank One, and Trione, as set forth in the Petition. The pleadings and affidavits on file herein establish that no genuine issue exists as to any material fact necessary to defeat Plaintiffs' claims, and that FDIC, Bank One, and Trione are entitled to judgment as a matter of law.

6. In the alternative, if judgment is not rendered upon all of Plaintiffs' claims and a trial is necessary, FDIC, Bank One, and Trione request the Court to make an Order specifying the facts not substantially controverted, pursuant to Fed. R. Civ. P. 56(d).

II. UNDISPUTED FACTS UPON WHICH MOTION FOR PARTIAL SUMMARY JUDGMENT IS BASED.

7. In support of their Motion for Partial Summary Judgment, FDIC, Bank One, and Trione refer this Court to the pleadings, the Affidavit of C.C. Prudhomme, III, together with the exhibits attached thereto, the Affidavits of A. Burch Waldron, III, together with the exhibits attached thereto, and the accompanying Brief in Support of Motion for Partial Summary Judgment. In particular, FDIC, Bank One, and Trione direct this Court's attention to the following summary judgment evidence which demonstrates that no genuine issue exists as to any material fact and FDIC, Bank One, and Trione are entitled to judgment as a matter of law.

8. On June 11, 1980, Ronald E. Chamness ("Chamness") and the Estate of Marlene Chamness ("Chamness Estate") executed a Homestead Affidavit stating, inter alia, that the real property in Highland Park, Dallas County, Texas, commonly known as 4208 Armstrong Parkway (the "Armstrong Property"), "does not constitute any part of [Chamness'] business or urban homestead, and the [Armstrong Property] is not claimed or designated by him as homestead property."

(Prudhomme Aff. at ¶3 with attached Exhibit "A"). (Waldron Aff. at ¶2 authenticating Plaintiffs' Responses to MBank's First Requests for Admission ("Requests for Admission") Nos. 18 and 19 referencing Exhibit 12). On January 9, 1981, Chamness executed a Subordination Agreement stating, inter alia, at paragraph 2, that the Armstrong Property was not his homestead. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 34, 35 and 36 referencing Exhibit 112). The statements made in the above referenced Subordination Agreement were made in connection with a $1.5 million deed of trust and note in favor of RepublicBank. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 29, 30, 31, 32 and 33 referencing Exhibits 16 and 16A).

9. On June 3, 1981, Chamness executed a Non Homestead Affidavit stating, inter alia, that the Armstrong Property was not his business or residence homestead, and that he renounced and disclaimed any homestead right, interest, or exemption in such property. (Prudhomme Aff. at 4 with attached Exhibit "B"). (Waldron Aff. at 2 authenticating Answers to Requests for Admission Nos. 37 and 38 referencing Exhibit 23). The above referenced Non- Homestead affidavit was executed in connection with a $937,500.00 note from RepublicBank secured by a modification of the RepublicBank Deed of Trust referenced in the above paragraph. (Waldron Aff. at ¶2 authenticating Answers to

Requests for Admission Nos. 40, 41 and 42 referencing Exhibit 25 thereto, and Answers to FDIC's First Requests for Admission Nos. 1 and 2 referencing Exhibit No. 1 thereto).

10. On June 21, 1983, Chamness executed and delivered to First City Bank of Dallas a Deed of Trust Note (the "Note") in the original principal sum of $2,550,000.00. Bank One is now the owner and holder of the Note. As security for the Note, Chamness executed on June 28, 1983 a Deed of Trust Security Agreement and Assignment of Rents ("June 21, 1983 Deed of Trust") covering the Armstrong Property. Chamness represented in the June 21, 1983 Deed of Trust that the Armstrong Property was not and had not constituted his homestead, and as security for the Note, was subject to foreclosure under the terms of the June 21, 1983 Deed of Trust should Chamness default on the Note. (Prudhomme Aff. at ¶5 with attached Exhibit "C"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 50, 51, 66 and 67 referencing Exhibits 38 and 42 thereto). The funds advanced by First City Bank of Dallas paid off the amounts owing under the RepublicBank notes and deeds of trust referenced in paragraphs 8 and 9 above. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 137 and 138).

11. On June 21, 1983, Chamness executed an Affidavit, where he stated, inter alia that the Armstrong Property was not his homestead. (Prudhomme Aff. at ¶6 with attached

Exhibit "D"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 52 and 53 referencing Exhibit 39).

12. On or about March 8, 1985, First City Bank of Dallas assigned the note and deed of trust referenced in paragraph 10 above to MBank. This is one of the two Deeds of Trust challenged in Plaintiffs' suit. (Waldron Aff. at ¶3 referencing the certified copy of the Assignment, Exhibit "B" thereto).

13. On or about March 7, 1984, Chamness and his wife, Rhea Ann Chamness, executed another Deed of Trust, Security Agreement and Assignment of Rents ("March 7, 1984 Deed of Trust") which specifically states on Exhibit "C" that "[Chamness] expressly represents that none of the [Armstrong Property] is claimed by [Chamness] as homestead and [Chamness] renounces all and every claim that any portion of the [Armstrong Property] is used or claimed by [Chamness] as exempt from forced sale under the laws of the State of Texas." This is the second of the two Deeds of Trust challenged in Plaintiffs' suit. (Prudhomme Aff. at ¶7 with attached Exhibit "E"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 79 and 80 referencing Exhibit 49 thereto). Such Deed of Trust is secured by a note in the amount of $7.5 million. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 82, 83 and 84 referencing Exhibit 115).

14. There is no documentation in the official bank records of either Bank One and/or MBank regarding any

written document or other agreement between MBank and Plaintiffs which show that the Armstrong Property was Chamness' homestead. On the contrary, all of the records affirmatively show that the Armstrong Property was not Chamness' homestead. (Prudhomme Aff. at ¶8).

III. ISSUES OF LAW TO BE DETERMINED.

15. The following are the only issues that need to be determined with respect to granting FDIC's, Bank One's and Trione's Motion for Partial Summary Judgment. Each of these issues will be shown to require a negative answer on the basis of the evidence and the applicable substantive law as set forth in the accompanying Brief in Support of Motion for Partial Summary Judgment:

(a) Whether Plaintiffs are entitled to assert home stead defenses to lien claims in spite of written representations that the property at issue was not homestead and which are based upon alleged oral agreements, misrepresentations and courses of conduct of the failed MBank, all of which are not recorded in the official bank records?

(b) Whether Plaintiffs are entitled to recover exemplary damages, prejudgment interest, or attorneys' fees?; and

(c) Whether Plaintiffs are entitled to recover against Trione where Plaintiffs have not alleged that Trione acted outside the scope of his authority as an officer of MBank?

IV. CONCLUSION.

WHEREFORE, FDIC, Bank One and Trione request:

(1) That Judgment be accordingly entered in favor of FDIC, Bank One and Trione against Plaintiffs and that Plaintiffs take nothing from the FDIC, Bank One and Trione by way of their action herein;

(2) In the alternative, that the Court enter partial Summary Judgment on such issues as the Court finds are not substantially controverted, pursuant to Fed. R. Civ. P. 56(d); and

(3) That this Court grant FDIC, Bank One and Trione such other and further relief to which FDIC, Bank One and Trione may show themselves justly entitled.

Respectfully submitted,

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/s/ By: _____
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and

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ATTORNEYS FOR FEDERAL DEPOSIT INSURANCE CORPORATION, N.A. AS RECEIVER FOR MBANK DALLAS, N.A., BANK ONE TEXAS, N.A., AND WILLIAM R. TRIONE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Partial Summary Judgment has been served by certified mail, return receipt requested to the following attorneys of record on this 1st day of December, 1989:

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/s/_____
A. BURCH WALDRON, III

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., OREGON, INC., WILLIAM R. TRIONE AND ALINDA HILL WIKERT

Defendants.

MEMORANDUM OPINION AND ORDER

CAME ON the Court this day to consider: (1) the Motion for Partial Summary Judgment submitted by Defendants FDIC as Receiver for MBank Dallas, Bank One Texas, and William R. Trione, which Motion was filed on 12/6/89, to which there is no timely response; (2) the Plaintiffs' Objections to the Affidavits of Waldron and Prudhomme in support of their motion for summary judgment, which objection was filed on 4/9/90, and the FDIC's Objection thereto of 5/7/90; (3) the FDIC's Motion for Sanctions filed 6/18/90, to which Plaintiffs have not responded; (4) the FDIC's Rule 16(f)

Motion for Sanctions filed 6/26/90, to which the Plaintiffs have not responded; (5) Defendant Wikert's Rule 16(f) Motion for Sanctions, to which Plaintiffs have not responded; and (6) Defendant Wikert's Motion for Sanctions filed 6/25/90, to which the Plaintiffs have not filed a response.

I. The Motion for Partial Summary Judgment

A. Standards for summary judgment

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to his case and on which he bears the burden of proof, and renders all other facts immaterial because there is no longer a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 273 (1986).

When a defendant fails to respond to a motion for summary judgment, the court may not simply grant a "default" summary judgment. Hebernia National Bank v. Admistricion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985). The district court may, however, accept as undisputed the facts listed in support of the movant's summary judgment motion and grant the motion where the movant has made a prima facie showing of its entitlement to summary judgment. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988).

When a defendant fails to bring forward specific facts demonstrating a genuine issue for trial, summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 273 (1986).

B. Factual background

This action was originally filed by the Plaintiffs in state court against defendant MBank Dallas. On 3/28/89 MBank was declared insolvent and the FDIC was appointed as the Receiver for MBank. Subsequently, the FDIC as Receiver, the FDIC, and the Deposit Insurance Bridge Bank ("DIBB") intervened as parties defendants and this case was removed to this Court pursuant to 12 U.S.C. §1819(Fourth).

The Court accepts as undisputed the following facts:

(1) On 6/11/80, Ronald E. Chamness ("Chamness") and the Estate of A. Marlene Chamness ("Chamness Estate") executed a Homestead Affidavit stating, inter alia, that the real property in Highland Park, Dallas County, Texas, commonly known as 4208 Armstrong Parkway (the "Armstrong Property"), "does not constitute any part of [Chamness'] business or urban homestead, and the [Armstrong Property] is not claimed or designated by him as homestead property." (Prudhomme Aff. at ¶3 with attached Exhibit "A").[2]

(2) On 6/3/81, Chamness executed a Non-Homestead Affidavit stating, inter alia, that the Armstrong Property was not his business or residence homestead, and that he renounced any homestead right, interest, or exemption in

[2] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 18-19 and Exhibit 12 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

such property. (Prudhomme Aff. at ¶4 with attached Exhibit "B").[3]

(3) On 6/21/83, Chamness executed and delivered to First City Bank of Dallas a Deed of Trust Note (the "Note") in the original principal sum of $2,550,000.00. Bank One is now the owner and holder of the Note. As security for the Note, Chamness executed on June 28, 1983 a Deed of Trust Security Agreement and Assignment of Rents ("June 21, 1983 Deed of Trust") covering the Armstrong Property. Chamness represented in the June 21, 1983 Deed of Trust that the Armstrong Property was not and had not constituted his homestead, and as security for the Note, was subject to foreclosure under the terms of the June 21, 1983 Deed of Trust should Chamness default on the Note. (Prudhomme Aff. at ¶5 with attached Exhibit "C").[4]

(4) On or about 6/21/83, Chamness executed an Affidavit, where he stated, inter alia that the Armstrong Property was not his homestead. (Prudhomme Aff. at ¶6 with attached Exhibit "D").[5]

(5) On or about 3/7/84, Chamness executed another Deed of Trust, Security Agreement and Assignment of Rents ("March 7, 1984 Deed of Trust") which specifically states on Exhibit "C" thereto that "[Chamness] expressly represents that none of the [Armstrong Property] is claimed by [Chamness] as homestead and [Chamness] renounces all and every claim that any portion of the [Armstrong Property] is

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[3] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 37-38 and Exhibit 23 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

[4] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 50-51 and Exhibit 38 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

[5] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 52-53 and Exhibit 39 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

used or claimed by [Chamness] as exempt from forced sale under the laws of the State of Texas." This is the second of the two Deeds of Trust challenged in Plaintiffs' suit. (Prudhomme Aff. at ¶7 with attached Exhibit "E").[6]

C. Plaintiffs' factual allegations and claims

Plaintiffs' claims are based upon the following factual allegations:

(1) that Ronald E. Chamness was the fee simple owner of the Armstrong Property. (Petition ¶ 3).

(2) that the Plaintiffs used the property as a homestead at all relevant times. (Petition ¶ 3).

(3) that at all pertinent times, the Armstrong Property was encumbered by certain deeds of trust in favor of MBank, and that none of the loans evidenced by the notes issued in conjunction with and secured by said deeds of trust provided any of the funds for purchase of the homestead property. (Petition ¶ 4).

(4) that MBank, as owner or assignee of the deeds of trust, posted the Armstrong Property for foreclosure and sold it on 6/3/86. (Petition ¶ 5).

(5) that MBank knew or should have known that the Armstrong Property was Plaintiffs' homestead and that the Property was either exempt or partially exempt from foreclosure. (Petition ¶7).

(6) that MBank induced Plaintiffs not to contest the foreclosure by failing to disclose to Plaintiffs that the Armstrong Property was Plaintiffs' homestead. (Petition ¶ 15).

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[6] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 79-80 and Exhibit 49 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

(7) that Plaintiffs in fact failed to contest the fore closure because of MBank's alleged nondisclosure. (Petition ¶ 15).

As relief, Plaintiffs' seeks to: (1) set aside the foreclosure sale of the Armstrong Property; (2) recover allegedly exempt property and money received by MBank from the foreclosure sale; (3) recover damages for the alleged wrongful foreclosure by MBank; (4) recover damages for MBank's alleged failure to disclose to Plaintiffs their alleged homestead right, thus fraudulently inducing them not to contest the foreclosure; and (5) recover attorneys' fees.

D. Governing law

(1) Defendant FDIC

In D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), the Supreme Court first enunciated the rule that a person dealing with an FDIC-insured institution may not assert a claim or defense against the FDIC which is based upon a secret side agreement he had with the bank because he has, no matter how innocently, lent himself to a scheme which would deceive the banking authorities. If the agreement is not properly documented in the bank's files, it is "secret" as to the FDIC. Id. at 461. Recognizing the importance of the policy underlying D'Oench, Duhme, Congress enacted 12 U.S.C. §1823(e) which, prior to 8/9/89, read as follows:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either

> as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.[7]

In Langley v. FDIC, 484 U.S. 86, 93, 98 L.Ed.2d 340, 348 (1987), the Supreme Court expounded on the policy and reasoning underlying D'Oench when it held that

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[7] Section 217 of FIRREA, effective August 9, 1989, reenacted substantially the former provision, setting its provisions out in paragraph rather than clause form, making tense changes, and adding FDIC as Receiver. Section 1823(e) now reads as follows:

> **Agreements against interests of Corporation**
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
>
> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemoporaneously with the acquistion of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board of committee, and
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

> [O]ne who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in D'Oench, Duhme) or of the truthfulness of a warranted fact.

With regard to the Plaintiffs' claim of fraud in the inducement, the Langley Court held "that neither fraud in the inducement nor knowledge by the FDIC is relevant to [§ 1823(e)]'s application." Id. The Court reasoned as follows:

> While the borrower who has relied on an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. ...
>
> The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise.

Langley, 484 U.S. at 94-95, 98 L.Ed.2d at 349. Thus, it is irrelevant that the borrower did not knowingly participate in the fraud, and it is also irrelevant that the borrower may not have actually had dealings with the failed bank. Chatham Ventures, Inc. v. FDIC, 651 F.2d 355 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982).

Furthermore, the rationale and policy behind D'Oench,

Duhme and 1823(e) applies to affirmative claims for relief against the FDIC as well as to affirmative defenses, because if an obligor as plaintiff or counter-plaintiff asserted "oral side agreements reducing the value of assets formerly held by the bank, then the FDIC would be misled." Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

In addition, "the D'Oench, Duhme doctrine also bars the assertion of affirmative claims for relief against the FDIC and its successor for alleged wrongful conduct by the filed bank." RSR Properties, Inc. v. FDIC, 706 F.Supp. 524, 531 (W.D. Tex 1989). Accord, First National Bank v. FDIC, 707 F.Supp. 265, 271 n.12 (W.D. Tex. 1989) ("the public policy interests stated in D'Oench, Duhme ... have been extended to shield the FDIC from liability for the misconduct of failed banks.").

Lastly, it is implicit in Plaintiffs' claims for relief that the purported status of the Armstrong Property as their homestead would serve to supersede any other laws affecting the property. In this regard, the Court notes that in Templin v. Weisgram, 867 F.2d 240 (5th Cir.), cert. denied, 110 S.Ct. 63 (1989), the Court held that D'Oench, Duhme and § 1823(e) barred the borrower from asserting that a facially valid deed of trust, deed, and note were not enforceable. Thus, Templin specifically established that the federal protections of the FDIC overrides the homestead protection generally afforded by the Texas Constitution.

(2) Defendants Deposit Insurance Bridge Bank and Bank One

In RSR Properties, Inc. v. FDIC, 706 F.Supp. 524, 531 (W.D. Tex. 1989), the court held that

> [T]he implication of D'Oench, Duhme is that those affirmative defenses and counterclaims which are deemed barred as to the FDIC are equally barred as to NCNB, an entity taking the instrument from the and under the management of the FDIC. FSLIC v. Murray, 853 F.2d 1251 (5th Cir. 1988) and cases cited therein; also FDIC v. Cremona Co., 832 F.2d 959, 964 (6th Cir. 1987), cert. dismissed sub. nom. Gonda v. FDIC, 108 S.Ct. 1494, 99 L.Ed.2d 879 (1988).

In addition, § 214 of FIRREA, codified at 12 U.S.C. § 1821(n)(4)(I) states, in pertinent part, that

> [N]o agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement—
>
> (i) is in writing,
> (ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the insured bank in default,
> (iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (iv) has been, continuously, from time of its execution, an official record of such insured bank in default.

It is asserted that Bank One was a bridge bank created by the FDIC to acquire a portion of the assets and assume certain liabilities of the former MBank institutions. Accordingly, pursuant to the authorities, any of the Plaintiffs' claims which are barred as to the FDIC should likewise be barred as against Bank One and the Deposit Insurance Bridge Bank.

(3) Defendant William R. Trione

Defendant Trione was, at all material time herein, a vice-president of the failed MBank. The petition makes no allegation that any of Trione's actions or representations were undertaken outside the scope of his employment as an officer of MBank.

As set forth in Whitehead v. FDIC, slip. op. CA3-89-0973-T (N.D.Tex. 9/13/89, Maloney, J.):

> Plaintiff has failed to allege that Defendant ... acted in any capacity other than as officers within their scope of employment with MBank. Therefore, this Court finds, in accordance with D'Oench and RSR Properties that Plaintiff has failed to state a cause of action against Defendants.

The Court agrees with the above opinion. Accordingly, summary judgment in favor of Defendant Trione is appropriate for failure to state a claim.

E. Application

Based upon all of the above, when the law is applied to the facts as alleged by the Plaintiffs and to the facts as found herein by the Court, summary judgment should be and is hereby

GRANTED with respect to all of Plaintiffs' claims as to Defendants FDIC, Bank One Texas, Deposit Insurance Bridge Bank, and William R. Trione. It is the Court's finding that it was Chamness who executed the deeds of trust, affidavits, and non-homestead affidavits set forth above in part I(B) hereinabove, and that those instruments and all other applicable loan documents are facially valid. It is the Court's opinion that D'Oench, Duhme, § 1823(e) and other law overrides the homestead protection upon which Plaintiffs base their claims, and that all of Plaintiffs' claims for are barred by the foregoing authorities.

Inasmuch as the Court has found that foreclosure and the actions of the Defendants were not wrongful, it follows that Plaintiffs' claims for attorneys' fees, prejudgment interest and exemplary damages should likewise be dismissed as to all Defendants.

II. Plaintiffs' Objections to the Affidavits of Waldron and Prudhomme

After review of the subject Affidavits and the circumstances set forth by the FDIC in its 5/7/90 response, the Court is of the opinion that the Plaintiffs' Objections should be DENIED on the merits. Alternatively, the Court would grant the FDIC's objection of 5/7/90 and deem the Plaintiffs' untimely objections to be stricken from the record.

III. The Motions for Sanctions

The Court has reviewed the motions for sanctions filed by various parties against the Defendants in this matter.

After review, it is the Court's opinion that the Plaintiffs have repeatedly engaged in willful and bad faith conduct: (1) in refusing to adhere to the various deadlines ordered herein, including the submission of a joint pretrial order, and (2) in failing to produce documents responsive to the FDIC's First Request for Production in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by U.S. Magistrate Tolle on 3/12/90.

Accordingly, the Court is of the opinion that the Motions for Sanctions should be GRANTED, and that the Plaintiffs' claims against all Defendants should be dismissed with prejudice.

The Court is also of the opinion that attorneys fees should awarded to the various parties defendants. The court will decide the award of attorneys fees from affidavits. As required by Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 137 (5th cir. 1986), each defendant's affidavits shall be in the form necessary to enable the court to made the required Johnson analysis, and shall be filed within 20 days of the date of this Order. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) and Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 581 (5th Cir. 1980). The details for those attorneys' fees incurred by any defendant for work performed by its attorneys germane to any counterclaim on its behalf herein, however, shall be clearly set forth and designated as such. Any responsive

memorandum and affidavit(s) are to be filed in accordance with Local Rule 5.1(e).

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment is GRANTED, and that Plaintiffs Ronald E. Chamness, Rhea Ann Chamness, Lisa C. Chamness, Ronald E. Chamness, Jr., and Holly A. Chamness take nothing from Defendants FDIC, Bank One and William R. Trione by way of Plaintiffs' action herein. It is further

ORDERED that Plaintiffs' claims as against all defendants herein are dismissed with prejudice, and that Plaintiffs take nothing from Defendant Alinda Hill Wikert. It is further

ORDERED that Plaintiffs shall pay defendants' attorneys' fees in amounts to be determined via affidavits as set forth above. It is further

ORDERED that all costs of court incurred herein shall be taxed against Plaintiffs.

SO ORDERED this 24th day of August, 1990.

/s/ _____
ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

App. E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., OREGON, INC., WILLIAM R. TRIONE AND ALINDA HILL WIKERT

Defendants.

FINAL JUDGMENT

This action came before the Court on Ronald E. and Rhea Ann Chamness ("Plaintiffs") Motion to Reconsider and Vacate Memorandum Opinion dated August 24, 1990. The issues having been duly considered and a decision having been rendered, pursuant to the Court's Order dated April 29, 1993, it is ORDERED and ADJUDGED that Plaintiffs' Motion to Reconsider and Vacate Memorandum Opinion is hereby DENIED.

IT IS FURTHER ORDERED and ADJUDGED that Plaintiffs take nothing by this suit, and that Judgment be, and

it is hereby, entered against Plaintiffs in all things, and in favor of Defendants Federal Deposit Insurance Corporation as Receiver for MBank Dallas, N.A., Bank One, Oregon, Inc., and William R. Trione; and

IT IS FURTHER ORDERED and ADJUDGED that the above-styled and numbered cause be, and it is hereby, DISMISSED with all costs taxed by the Clerk of Court against Plaintiffs.

SO ORDERED.

SIGNED this 29th day of April, 1993.

/s/ _____
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

No. 93-1573

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Petitioners,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit And Request For Summary Reversal

---

RESPONDENT ALINDA HILL WIKERT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT WIKERT
* Counsel of Record

BEST AVAILABLE COPY

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I. STATEMENT OF THE CASE

This appeal was brought by Ronald Chamness and Wife, Rhea Ann Chamness ("Chamness"), complaining of dismissal of their suit against the Federal Deposit Insurance Corp. as receiver for, MBank Dallas, N.A. ("FDIC"), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., William Trione, and Alinda Hill Wikert ("Wikert"). The District Court granted FDIC's Motion for Summary Judgment holding that Chamness was barred from asserting a homestead claim in seeking to invalidate a lien held by the FDIC under the doctrine set out in D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) and 12 U.S.C. §1823(e). Despite repeated extensions of time, Chamness failed to provide any response to the FDIC's Motion for Summary Judgment; therefore, the District Court accepted as true all of the factual allegations contained in the Motion and entered a Memorandum Opinion and Order granting summary judgment.[1] The District Court also dismissed Chamness' claims pursuant to pending Motions for Sanctions filed by FDIC and Wikert seeking relief under Federal Rules of Civil Procedure 16(f) and 37 for Chamness' failure to file a Joint Pre-trial Order and for discovery abuse. In April of 1993, the Court entered its Final Order of Summary Judgment and Sanctions.

The Fifth Circuit reviewed the granting of summary judgment *de novo* and, in the absence of any response by Chamness, accepted all facts alleged by the moving party as true. After a review of the record, the Fifth Circuit determined that an alternative legal ground for affirming the District Court's decision was supported by the record. The Fifth Circuit concluded that because Texas law barred Chamness' claim, the question of whether Chamness was also barred by D'Oench, Duhme and/or §1823, or whether the District Court was correct in dismissing Chamness' claim as a sanction for discovery abuse and/or non-compliance with court orders, was not reached.

---

[1] Although no summary judgment motion was filed on behalf of Wikert, the grant of a summary judgment in favor of FDIC constitutes a ruling on Chamness' claim as to title to the property in favor of Wikert. Wikert purchased the property pursuant to a contract with Chamness and an agreed foreclosure sale conducted by Oregon, Inc., an agent of MBank Dallas (now FDIC). Oregon, Inc., foreclosed on the lien which was being challenged by Chamness in the District Court.

II. SUMMARY OF ARGUMENT

Despite allegations of *sua sponte* acts by both the trial and the appellate courts, Chamness claims error for the reason that inconsistency exists between the various circuit courts of appeal in determining when a trial court judgment can be affirmed on legal grounds other than those relied upon by the trial court. Quite to the contrary, the circuit courts of appeal are consistent in applying this principle, a principle recognized by this Court as early as 1931 in the case of Langnes v. Green, 282 U.S. 531, 536-37, 51 S. Ct. 243, 75 L. Ed. 520 (1931) (the Court is "not limited to a consideration of the points raised by the [appellant], but 'must enter the judgment which should have been entered by the court below on the record before it'"). The authority cited by Chamness is simply not applicable.

Significantly, the evidence which Chamness claims he would have provided the trial court had he known an alternative legal theory would be relied upon is exactly the same evidence he should have provided in response to the motion for summary judgment in the trial court. Absent controverting evidence, the Fifth Circuit properly affirmed the summary judgment.

Chamness' claim that he was denied due process because the Fifth Circuit affirmed the summary judgment in favor of Wikert, when Wikert did not have a motion for summary judgment on file, fails to recognize the legal relationship between the two parties. Wikert is merely a subsequent purchaser of the property in question whose chain of title includes a foreclosure on the complained of lien. Wikert has committed no act giving rise to an independent claim, rather Chamness' claim against Wikert is dependent upon his ability to assert Texas homestead protections. The Fifth Circuit's conclusion that Chamness has "absolutely" no homestead claim is therefore a determination of Chamness' claim against Wikert.

III. ARGUMENT

A. Petitioner's Arguments Lack Focus

At first glance, it is not clear what action of the lower courts Chamness claims to be in error. Under "Question Presented," Chamness questions whether a trial court or a court of appeals has

the ability to grant or affirm a summary judgment *sua sponte* or on grounds not presented in the motion. Id. However, by Chamness' own account of the case, the **trial court** judgment was granted on proper motion and on a ground properly pled. Id. at p. 2. Therefore, logically, the actions of the trial court cannot be, and are not being, challenged.

As to *sua sponte* actions, Chamness implies that the Fifth Circuit acted "on its own will or motion... without prompting or suggestion." Black's Law Dictionary, p. 1277 (5th Ed. 1979). But Chamness readily admits the Fifth Circuit was reviewing the grant of a summary judgment by the District Court, and affirmed on an alternative legal theory. Id. As such, the Fifth Circuit did not **grant** summary judgment, *sua sponte* or otherwise, therefore those cases cited by Chamness (for example, the Fountain case, which is distinguished at length below) discussing *sua sponte* acts of the appellate court are inapplicable.

The subsequent summary of arguments contained on pages 3 and 11 of the petition appears to clarify the issue somewhat. Here Chamness challenges a court of appeals' ability to affirm summary judgment on grounds other than those relied upon by the trial court by asserting (1) there is a lack of certainty between the appellate courts as to when the judgment can be affirmed on alternative grounds; and (2) the practice violates due process. Chamness then gets disoriented in his own lack of clarity by re-urging the *sua sponte* reference (pp. 7, 8, 10) and again questioning the powers of the trial court (pp. 8, 10). Chamness also challenges a grant of a summary judgment in favor of Respondent Wikert when no such action has been taken. Petition, p. 7-8. Rather Chamness again confuses the issues by failing to recognize that the only reason Wikert is involved in this suit is that she purchased the property in question with a chain of title that includes a foreclosure on the allegedly invalid lien. Therefore, a finding by the Fifth Circuit (and the District Court) that Chamness "has no legitimate homestead claim" is a determination on the entirety of Chamness claims and is necessarily a finding in favor of Wikert. Petitioner's Appendix A, p. 7. See also Respondent's Appendix A, p. 4a. In other words, if Chamness has no claim of title to the property, he has no claim against those who subsequently hold title.

In the end, the only argument which remains is under what conditions can a court of appeals render summary judgment on legal grounds not relied upon by the trial court. After peeling away the inconsistencies in his Petition, Chamness argues simply that the various courts of appeal are not consistent in applying the standards used for affirming summary judgments on an alternative legal basis and that the practice is in violation of due process. It is these arguments which are before the Court and which are addressed by this response.

B. The Standards of the Circuit Courts are Certain and Consistent.

1. *Fifth Circuit Affirmed the Summary Judgment on Other Grounds.*

In its Memorandum Opinion and Order of August 24, 1990, the District Court determined that Chamness was barred by D'Oench, Duhme and §1823(e) from asserting that the property in question was his homestead. Chamness had asserted in his Complaint that the property encumbered by the FDIC's lien was protected by the Texas homestead laws but offered no summary judgment evidence that the property was his homestead. On the other hand, the FDIC provided the Non-Homestead Affidavits of Chamness which stated that the property in question was **not** homestead. As a result, the District Court found that the representations made in the Non-Homestead Affidavits operated as a bar to his claim of homestead under Templin v. Weisgram, 867 F.2d 240 (5th Cir. 1989), cert. denied, 110 S.Ct. 63 (1989); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); and 12 U.S.C. §1823(e). Petitioner's Appendix D, p. 9. More specifically, the District Court held the "federal protections of the FDIC override the homestead protection generally afforded by the Texas constitution." Id. Chamness' case was also dismissed as a sanction for failure to participate in the filing of a Joint Pretrial Order and other discovery abuse. Petitioner's Appendix D, p. 9.

On appeal, the Fifth Circuit did not consider FDIC protections afforded by D'Oench, Duhme or §1823(e) nor the dismissal of Chamness' claims as a sanction. Instead, as pointed out in the District Court's Order of April 29, 1993 (included as Appendix A), and Respondent Wikert's brief to the Fifth Circuit, the Fifth Circuit recognized that the uncontroverted summary judgment evidence established that **under Texas law** Chamness was estopped to assert home-

stead protections. More specifically, based upon the evidence before the District Court, it was uncontradicted that: (1) Mr. Chamness executed affidavits which disclaimed any homestead interest he may have had in the property; and (2) Mr. Chamness did not occupy the property in question at the time he executed the Non-Homestead Affidavits. Under Texas law, a homestead claimant is estopped to assert homestead rights in property if the claimant made a sworn declaration to the contrary and there was no actual use or possession of the property at the time of the sworn declarations. In re Niland, 825 F.2d 801, 808 (5th Cir. 1987); Patterson v. FDIC, 918 F.2d 540, 547 (5th Cir. 1990). In other words, when an owner of real estate is not occupying the property, while representing that the property is not homestead, the owner is estopped to later assert the homestead protections. Patterson, 918 F.2d at 547.

In upholding the District Court's ruling, the Fifth Circuit determined that it had the ability to affirm summary judgment on "grounds other than those stated by the district court." Petitioner's Appendix A, p. 6. In support of this conclusion, which Chamness finds to be in error, the Fifth Circuit cited the case of Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990). Recognizing the futility of challenging the right of a circuit court of appeals to apply the Alternative Basis Principal,[2] Chamness instead attempts to manufacture conflict between the various courts of appeal by claiming a "split of authority and [a] lack of clarity." Chamness' conclusions are misplaced.

2. *Standards of Circuit Courts of Appeal are Certain and Consistent.*

Before clearing up the alleged inconsistencies between the circuit courts created by Chamness' misinterpretation of authority, a review of an illustrative case from each circuit court is helpful. The opening comments of Chamness' Petition refer this Court to various opinions which reveal unwavering consistency in acknowledging the following rule:

---

[2] For brevity, the appellate principal which allows a reviewing court to affirm summary judgment on an alternative legal basis supported by the record shall be referred to herein as the "Alternative Basis Principle."

> A court of appeals is free to affirm a district court's decision on any ground supported by the record, even if the issue is not pleaded, tried or otherwise referred to in the proceedings below.

See Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 n.8 (1st Cir. 1990); Alfaro Motors Company, Inc. v. Ward, 814 F.2d 883, 887 (2nd Cir. 1987); Johnson v. Orr, 776 F.2d 75, 83 (3rd Cir. 1985); Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990) *cert. denied* 498 U.S. 900, 111 S. Ct. 257, 112 L. Ed. 2d 215 (1990); Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990); Hooks v. Hooks, 771 F.2d 935, 945 (6th Cir. 1985); Sally Beauty v. Nexxus Products Company, Inc., 801 F.2d. 1001, 1005 (7th Cir. 1986); Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990) *cert. denied* 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 48 (1990); Fidelity Financial Corporation v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir. 1986) *cert. denied* 479 U.S. 1064, 107 S. Ct. 949, 93 L. Ed. 2d. 998 (1987); Bath v. National Association of Intercollegiate Athletics, 843 F.2d 1315, 1317 (10th Cir. 1988); Estate of Whitt v. C.I.R., 751 F.2d 1548, 1558 (11th Cir. 1985) *cert. denied* 474 U.S. 1004, 106 S. Ct. 523, 88 L. Ed. 2d. 456 (1985). Chamness attempts to portray the decisions of Keith and Bernhardt as not requiring the alternative grounds to be supported by the record before the district court; however, a closer examination reveals that these cases also contain this requirement. Keith, 900 F.2d at 739; Bernhardt, 892 F.2d at 444.

This very Court has also applied the principal relied upon by the Fifth Circuit in cases where the record of the lower court is reviewed *de novo*, noting the Court is "not limited to a consideration of the points raised by the [appellant], but 'must enter the judgment which should have been entered by the court below on the record before it.'" See Langnes v. Green, 282 U.S. 531, 536-37, 51 S. Ct. 243, 75 L. Ed. 520 (1931). The Fifth Circuit's review of the summary judgment was a *de novo* review of the record. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). This Court has also ruled similarly in Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 301, 1 L. Ed. 2d 314 (1957) ("A successful party in District Court may sustain its judgment on any ground that finds support in the record.") and Dandridge v. Williams, 397 U.S. 471, 475 fn. 6, 90

S. Ct 1153, 25 L. Ed 2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not the ground was relied upon or even considered by the trial court").

3.*Chamness' Authority is Neither Determinative nor Controlling.*

The main thrust of Chamness' Petition is that the Fifth Circuit improperly affirmed a summary judgment on factual and legal theories not before the District Court, thereby depriving Chamness of any opportunity for rebuttal. Despite overwhelming authority from **all** of the Circuit Courts of Appeal and the United States Supreme Court to the contrary, Chamness attempts to create inconsistency in the "standards" used by the various appellate courts for utilizing this procedural tool. However, Chamness has failed to carefully review the authority he cites, authority which does not support his position.

Chamness primarily relies upon four cases. The first case, a Fifth Circuit opinion, recognizes the Alternative Basis Principle, but declines to apply it where a new defense was raised for the first time in a supplemental brief filed the day before oral argument. F.D.I.C. v. Laguarta, 939 F.2d 1231, 1240 (5th. 1991). The Court determined that it would not be proper under those circumstances to affirm on the newly injected theory. Id. In a footnote, however, the Court stated:

> We do not suggest that if the issues were implicit or included in those raised below or the evidence in support thereof, or if the record appears to be adequately developed in respect thereto, that affirmance may not rest thereon. However, this is not the case here.

Id. at 1240 n.20.

The second case cited by Chamness, Arlinghaus v. Ritenour, 622 F.2d 629 (2nd Cir. 1980), is similar to Laguarta. The Second Circuit first recognized its ability to affirm the ruling of the lower court on summary judgment on "any argument which is supported by the record" if: (1) the issue was adequately presented below; (2) the parties had a full opportunity to develop the relevant facts; and (3)

the appellate court had the benefit of thorough briefing. Id. at 683. The Second Circuit then affirmed the summary judgment on grounds **raised for the first time at oral argument**, reasoning the issue was discussed in post-trial briefs, the issue was explored in discovery and supplemental briefs had been requested. Id. at 639.

In Charbonnages De France v. Smith, 597 F.2d 406 (4th Cir. 1979), the Fourth Circuit held an appellate court is "not bound on review to consider only those specific grounds upon which the district court based its grant of summary judgment, but could affirm if [it] perceived alternative grounds." Id. at 416. The Fourth Circuit however, declined to affirm on alternative grounds, reasoning "summary judgment was not warranted on any alternative basis" supported by the record. Id.

Finally, Chamness cites Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) which, upon close examination, does not even speak to the issue at hand. In Ramirez, the Court rejected a dissent by the minority (which, incidentally, included Justice Scalia) attempting to convert a district court's order granting of a Rule 12(b)(6) Motion to Dismiss into a summary judgment. Id. at 1536. The D.C. Circuit rejected the dissent's argument that Rule 12(b) permitted a motion to dismiss to be converted to a summary judgment because the rule was intended to apply to the **trial** court, not the appellate court. Id. at 1537. The D.C. Circuit did recognize, however, that if the trial court record and pleadings "squarely raised" the alternative issue such that the relevant facts had been explored, affirming the trial court's dismissal on an alternative theory in a *sua sponte* motion for summary judgment would be appropriate. Id.

Chamness argues that these cases demonstrate inconsistency between the appellate courts "concerning when a Court may *sua sponte*... affirm [summary judgment] on grounds not raised in the motion." Petition, p. 7. However, the authorities cited by Chamness do not provide this Court with any basis for determining that there is a "split of authority" or a "lack of certainty" as to the standards which must be applied when a court of appeals utilizes the Alternative Basis Principal. By contrast, each of these cases recognize the standard which is clearly enunciated in the very opinions Chamness references. Additionally, none of these cases are factually similar to the case at hand. The Texas law relied upon was raised in the Response

to Chamness' Motion to Reconsider in the District Court, noted in the Order accompanying the Final Judgment of the District Court, and briefed for the Fifth Circuit. Therefore, any exception allegedly created by the authority cited by Chamness is clearly not applicable.

4. *Chamness Had Full Opportunity to Respond.*

a. *Fountain* is Inapplicable.

Apparently acknowledging the lack of authority, Chamness then completely abandons his "inconsistency" argument and reasons that it is simply "improper for a court of appeals to grant summary judgment in the absence of a fair opportunity for a non-movant to set forth grounds for denying the motion for summary judgment." Petition, p. 7 *citing* Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949). This is not the issue before the court today; nonetheless the comment does raise some interesting points in the history of the case. But before addressing whether Chamness had a "fair opportunity" to present opposing evidence, it should be pointed out how the Fountain case is clearly distinguishable from the present facts.

Fountain involved a grant of summary judgment by an appellate court in favor of a non-moving plaintiff on a claim which had not been advanced by the plaintiff. Fountain, 336 U.S. at 682. The appellate court reasoned that a request for "other relief" in the petition was a sufficient request for summary judgment. Id. The Supreme Court held that this amounted to a denial of opportunity for the defendant to dispute the facts relied upon by the court of appeals as no motion had been filed by the plaintiff; therefore the defendant had no reason to bring any disputing facts before the Court. Id. at 683. Quite to the contrary, in the present case, the Fifth Circuit affirmed a ruling of District Court in favor of the moving party. Additionally, as set forth in more detail below, Chamness had a **full and fair opportunity** to present facts which disputed the summary judgment evidence relied upon by the Fifth Circuit, but chose not to file any response despite numerous extensions. For these reasons, the Fountain case is simply not on point.

b. Chamness Failed to Use Opportunity

Recognizing he had an opportunity to oppose the Motion for Summary Judgment, Chamness asserts he did not file a response to the FDIC's

Motion for Summary Judgment because he did not dispute the summary judgment evidence; namely (1) that he made a representation; and (2) that the original lender had been placed in receivership. Petition, p. 9. Apparently because the words "estoppel to claim homestead" did not appear in the motion, Chamness determined there was **no need for a response** to the summary judgment. Chamness even goes so far as to call filing a response a "fool's errand". Id. This comment demonstrates Chamness' cavalier attitude toward his entire case while in the trial court, an attitude which resulted in a dismissal as a sanction for failure to comply with numerous court orders. Interestingly though, the response which Chamness claims he would have filed had he been made aware of these "unknown" legal theories, is factually the same response he should have filed.

In Chamness' Appellants' Brief to the Fifth Circuit (attached as Appendix B), Chamness challenged the District Court's bar of Chamness' homestead claim, primarily relying upon the case of Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990), wherein the Fifth Circuit rejected the FDIC's attempt to utilize 12 U.S.C. §1823(e) as a bar to a plaintiff's homestead claims. Appendix B, p. 18b. Chamness correctly argued that Patterson holds that a homestead right "exists independent of any agreement of the parties." Appendix B, p. 11 (citing Patterson and In Re Howard, 65 B.R. 498, 503 (Bankr. W.D. Tex. 1986)). Relying upon this authority, Chamness concluded:

> Claims and defenses **based on facts and circumstances** existing at the time an instrument was executed in favor of a failed bank are not barred by FDIC superpowers.

Appendix B, p. 18b (emphasis added). Chamness then argued:

> [T]he Chamness family homestead existed because of the Family's actual possession, use, and occupancy of it, not because of any agreement not reflected in MBank's official files... The homestead claim arose because of facts, it was not based on understandings, schemes, representations or agreements.

Appendix B, p. 19b.

By Chamness' own acknowledgement, and under the authority of Patterson and Howard, to defeat the motion for summary judgment by asserting the protections of D'Oench, Duhme and/or 12 U.S.C. §1823(e), it is necessary to produce evidence of actual use and/or possession of the property. In other words, to defeat the D'Oench, Duhme theory, Chamness needed evidence that his homestead rights were derived from "actual possession, use, and occupancy," i.e., that his claim was not based upon a "secret side agreement." *See* Patterson; Howard. However, Chamness failed to provide this or any evidence, and the Fifth Circuit properly accepted the facts contained in the motion for summary judgment as true. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1980). As a result, the uncontroverted summary judgment evidence was that Chamness' did not use, possess or occupy the property as his homestead. Petitioner's Appendix A, p. 6.

By the same token, the estoppel argument on which the Fifth Circuit based its decision is applicable in circumstances where the borrower has made non-homestead declarations at a time they were not in actual use and possession of the property. In Re Niland, 825 F.2d, 801, 808 (5th Cir. 1987); Patterson, 918 F.2d at 547. Therefore, whether Chamness was opposing a summary judgment based upon the protections afforded under federal law (D'Oench, Duhme and/or §1823(e)) or the protections afforded by Texas law (estoppel to claim homestead), the evidence brought before the District Court would have been the same: evidence showing that at the time the Non-Homestead Affidavits were executed, Chamness was in actual use and possession of the property. Only with such evidence could Chamness establish a homestead claim that was not based upon "an agreement, scheme, or bank representation." *See* Patterson, 918 F.2d at 545.

Finally, and most importantly, Chamness continues to ignore his total failure to respond to the pending motion for summary judgment. Rather, Chamness prefers to characterize himself as a naive plaintiff who was blindsided by the procedural machinations of the federal court system. Nothing could be further from the truth. As noted by the Fifth Circuit, Chamness was granted "repeated extensions of time" for filing a response to the motion for summary judgment, but failed to do so. Petitioner's Appendix A, p. 6. Such failure to respond was not due to any act of the District Court, any Defen-

dant, nor any outside forces. The failure to take advantage of this "opportunity to respond" lays squarely on the shoulders of Chamness.

In conclusion, the Fifth Circuit's affirmation of the District Court's summary judgment is consistent with the practices of every Circuit Court of Appeals and the Supreme Court. Additionally Chamness had a full and fair opportunity to create fact issues in response to the summary judgment, but elected not to do so. As a result, this Court can take no action other than the denial of this Petition for Writ of Certiorari.

C. Judgment in Favor of Wikert Does Not Deny Due Process to Chamness

In his second argument to this Court, Chamness claims he has been denied due process by the Fifth Circuit's *sua sponte* summary judgment in favor of Respondent Wikert. Chamness argues that because Wikert did not have a motion for summary judgment pending in the trial court at the time the case was dismissed, the Fifth Circuit has improperly granted summary judgment for Wikert. Once again Chamness is off the mark.

The ruling of the Fifth Circuit clearly determines that Chamness has "absolutely" no homestead interest. Petitioner's Appendix, p. 7. As explained above, Chamness' claim against Wikert is based solely upon the fact that she purchased the property in connection with the foreclosure of the complained of lien. Wikert has not committed, nor has Chamness complained of, any independent acts which warrant any other claim. As such, when the Fifth Circuit affirmed the summary judgment reasoning that no homestead claim existed, it necessarily made a ruling which determined the fate of Chamness' claim, even absent Wikert's own Motion for Summary Judgment. Therefore, the dismissal of the claim against Wikert was proper. See Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984). See also Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 301, 1 L. Ed. 2d 314 (1957) ("A successful party in District Court may sustain its judgment on any ground that finds support in the record") and Dandridge v. Williams, 397 U.S. 471, 475 fn. 6, 90 S. Ct 1153, 25 L. Ed 2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not the ground was relied upon or even considered by the trial court").

Chamness contentions that the grant of summary judgment violates his due process necessarily implies that he would have prepared a substantially different response (or at least **a** response) to the pending summary judgment if Wikert had also made such a motion. However, Chamness completely fails to show how he has been prejudiced, and instead implies that attorneys would violate their ethical duties of fair advocacy and risk malpractice in hopes of "sneaking one" by an opposing party. The cold, hard reality is simply that Chamness completely failed to provide any summary judgment evidence, not that Chamness' best efforts were crushed by an unyielding judicial system. Chamness arguments ring hollow in their cry of denial of due process.

WHEREFORE, PREMISES CONSIDERED, Appellee Alinda Hill Wikert requests that this Court deny the Petition for Writ of Certiorari and grant such other and further relief to which Appellee Wikert may show herself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
ALINDA HILL WIKERT

- Appendix A -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. 3:89-CV-1117-P
FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR M-BANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A. OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,	§	
Defendants.	§	

ORDER

On August 24, 1990, Judge Robert Porter signed a Memorandum Opinion and Order in which he ruled on the motions for summary judgment of Defendants Federal Deposit Insurance Corporation (FDIC), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., and William R. Trione and motions for sanctions of these defendants and defendant Alinda Hill Wikert. Judge Porter held that the D'Oench-Duhme doctrine precluded the claim of homestead asserted

by Plaintiffs in this case and granted summary judgment for all defendants except Alinda Hill Wikert. Judge Porter also granted all of the defendants' motions for sanctions and ordered that all of Plaintiffs' claims be dismissed with prejudice against all defendants. Judgment was not entered pending the judge's ruling on the issue of attorneys fees on which the parties were to submit affidavits. At the time of entry of the Memorandum Opinion and Order, judgment would have been partial because one of the defendants had a counterclaim pending against plaintiff Ronald E. Chamness. That counterclaim has apparently now been discharged in bankruptcy. (see motion of Ronald E. and Rhea Ann Chamness to Dismiss their claims against Defendants William Trione and Oregon, Inc).

On July 23, 1991, and prior to Judge Porter's ruling on attorneys fees, plaintiffs Ronald E. and Rhea Ann Chamness filed for bankruptcy. The bankruptcy stay was lifted on June 8, 1992. Subsequent to the lifting of the bankruptcy stay, plaintiffs Ronald and Rhea Ann Chamness filed a Motion to Reconsider and Vacate Judge Porter's Memorandum Opinion and Order of August 24, 1990 and a motion to dismiss their claims against defendants FDIC, Oregon, Inc. and William Trione. Plaintiffs ronald E. Chamness, Jr., Holly A. Chamness, and Lisa C. Chamness filed motions to dismiss all of their claims as to all defendants. In response, the defendants filed motions opposing the motion to reconsider, opposing the dismissal of any of the plaintiffs' claims without prejudice, and motions to strike and objecting to late filed discovery responses of plaintiffs. The late filed discovery responses is an apparent attempt by plaintiffs to correct some of the conduct for which Judge Porter imposed sanctions in his Memorandum Opinion and Order of August 24, 1990.

For reasons set forth below, the court denies plaintiffs Ronald E. and Rhea Ann Chamness' motion to reconsider and motion to dismiss defendants FDIC, Oregon Inc. and William Trione, and denies plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness and Lisa C. Chamness' motion to dismiss their claims.

Motion to Reconsider

In their motion to reconsider, plaintiffs advance two main arguments. First, that the August 24, 1990, order is in error because it incorrectly applied the D'Oench-Duhme doctrine to preclude

plaintiffs' homestead claim. Second, that dismissing the case as an imposition of sanctions was improper because there was no discussion in the order of the consideration of any lesser sanction and, a review of the record reveals that the extreme sanction of dismissal was inappropriate.

In support of their first argument, plaintiffs cite the case of Patterson v. FDIC, 918 F. 2d. 540 (5th Cir. 1990) as an "identical case that was decided against the FDIC." In the Patterson case, the court held 12 U.S.C. § 1823(e) was not "so broad as to override the Texas Homestead Laws... we hold that under the facts of this case, § 1823(e) does not preclude Patterson from attempting to prove her homestead under Texas law.", Patterson, at 545. Defendants counter that Patterson is inapposite because it involved 12 U.S.C. § 1823(e) and not the D'Oench-Duhme doctrine and cite the case of Buchanan v. FSLIC, 935 F.2d. 83 (5th Cir. 1991) where the court held that the D'Oench-Duhme doctrine could preclude assertion of a homestead claim. Defendants also argue that plaintiffs are estopped from asserting their homestead claim because at the time that plaintiffs executed the affidavit of Non-Homestead, they were not occupying the residence in question.

The Court finds that on both of their arguments, the defendants are correct. Under Texas law, someone who represents that certain property is not his homestead and he is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property. As part of its motion for partial summary judgment, the FDIC submitted the affidavit of C.C. Prudhomme III, an employee of Bank One, Texas, formerly known as Deposit Insurance Bridge Bank. Attached to this affidavit are five exhibits (A-E) which are copies of five documents that plaintiff Ronald E. Chamness executed on four different dates. In each of these document, Chamness represents that the property in question is not his homestead. Exhibit B is a Non-Homestead Affidavit executed by Chamness on June 3, 1981. In it Chamness states, under oath, that "He does not now reside upon" the property in question. Exhibit D is an affidavit executed by Chamness on June 21, 1983. In this affidavit Chamness states, under oath, that he purchased the property in question in May, 1979, and began extensive renovation work on it in June, 1979. In paragraph three of that affidavit, Chamness

states that the property "was not ready for occupancy until August 20, 1991, and was not occupied." This summary judgment evidence has not been controverted, and was accepted by Judge Porter as undisputed in his Memorandum Opinion and Order of August 24, 1990. The Homestead Affidavit dated June 11, 1980, and the Non-Homestead Affidavit dated June 3, 1981, were executed by Chamness when he was not residing in the property in question. The plaintiffs are, therefore, estopped as a matter of law from asserting their homestead claim. Patterson, supra., and cases cited therein.

Additionally, in Buchanan, supra., the court stated that in determining whether D'Oench applied to bar a party's claim, the applicable test was whether the party "lent himself to a scheme or arrangement whereby the banking authority on which the FDIC relied in insuring the bank was or as likely to be misled." Under that test, the court looks at the "relative culpability of the party making the claim." Buchanan, supra., at 85. It is clear from the evidence recited above that the plaintiffs have lent themselves to a scheme to mislead the banking authorities, and are now precluded, under the D'Oench-Duhme doctrine, from asserting their homestead claim against the defendants.

Plaintiffs also seek reconsideration of Judge Porter's decision to dismiss all of plaintiffs' claims as an imposition of sanctions. The Fifth Circuit has stated that dismissal of a case as a sanction will be upheld where there is a showing of "a clear record of delay or contumacious conduct by the plaintiff and when lesser sanctions would not serve the best interests of justice." Sturgeon v. Airborne Freight Corp., 778 F.2d 1154 (5th Cir. 1985). In summary, the record in this case reveals that plaintiffs have failed to produce documents in response to two Requests for Production of Documents filed by the FDIC. In particular, the record with respect to the First Request for Production is illuminating with respect to plaintiffs' conduct in this case. That request was filed on September 13, 1989. On October 26, 1989, the FDIC filed a Motion to Compel. Various negotiations ensued between the parties and the motion to compel was not heard. Plaintiffs' counsel was allowed to withdraw by Magistrate Judge Tolle by order dated December 20, 1989, but Judge Tolle informed the parties that his order did not "extend the dates upon which response to outstanding discovery requests must be made." Neverthe-

less, the documents were not produced, and on February 21, 1990, the FDIC sent Chamness a letter requesting that he produce the documents requested. On March 2, 1990, the FDIC filed its second Motion to Compel. On March 12, 1990, after a hearing, Judge Tolle ordered plaintiffs to produce the documents by March 30, 1990. At the hearing, Judge Tolle told Chamness personally that no more extensions of time would be forthcoming. On March 27, 1990, plaintiffs filed another motion for extension of time seeking more time to file a response to defendants motion for partial summary judgment and to extend the discovery and scheduling deadlines. This was plaintiffs' seventh motion for extension of time. After a hearing on April 2, 1990, the motion was denied by Judge Tolle. In his order denying plaintiffs' request for more time, Judge Tolle stated, "Plaintiffs have shown nothing which would justify further delay in this case. Plaintiffs have repeatedly asked for extensions of time to file required responses and to extend scheduling deadlines, and this Court has repeatedly granted those requests. At a hearing on March 12, 1990, the undersigned magistrate once again granted Plaintiffs' request for extension of time, but advised Plaintiff Chamness personally that no further extensions of time would be forthcoming." Judge Tolle's order of March 12, 1990, ordering production of the documents by March 30, 1990, was not complied with, and on April 9, and May 18, 1990, the FDIC sent letters to plaintiffs requesting production of the documents. As of the date of Judge Porter's Order of August 24, 1990, plaintiffs had still not complied with Judge Tolle's order.

The record also shows that plaintiffs had not complied with Judge Tolle's order of March 12, 1990, that documents be produced by March 30, 1990, pursuant to the FDIC's Second Request for Production of Documents filed on December 8, 1989. Additionally, plaintiffs failed to comply with Requests for Admissions, and Interrogatories were answered nine days late and were not answered under oath.

By order dated October 4, 1989, Judge Porter required the parties to submit a joint Pre-Trial Order by June 22, 1990. By motion of March 27, 1990, plaintiffs sought to have that deadline extended. The motion was denied by Judge Tolle in his order of April 2, 1990, but plaintiffs failed to participate in the preparation and submission of a joint Pre-Trial Order.

Plaintiff also failed to file any response to the defendants' motions for summary judgment, even though the time for filing responses was extended twice.

Finally, in his Memorandum Opinion and Order of August 24, 1990, Judge Porter noted that plaintiffs had not filed responses to two motions for sanctions filed by the FDIC in June, 1990, nor to two motions for sanctions filed by defendant Wikert also in June, 1990. These motions for sanctions were the basis for the dismissal of plaintiffs' claims by Judge Porter. In their July 28, 1992, Motion to Reconsider, plaintiffs, for the first time, challenge the motions for sanctions filed by the defendants. This is over three years after the motions were filed by defendants and almost three years since Judge Porter entered his Memorandum Opinion and Order.

Judge Porter found that plaintiffs had "repeatedly engaged in willful and bad faith conduct" with respect to meeting deadlines and court orders and with respect to discovery. After a review of the record, this court agrees with those findings and with the finding that dismissal of Plaintiffs' claims was the appropriate sanction.

Plaintiffs' Motions to Dismiss

Plaintiffs' Ronald E. Chamness and Rhea Ann Chamness seek dismissal of their claims against defendants FDIC, Oregon, Inc., and William Trione. Plaintiffs Ronald E. Chamness, Jr., Lisa C. Chamness, and Holly A. Chamness move to dismiss all of their claims as to all defendants. Rule 41(a) (1), Fed. Rules Civ. Proc., allows a plaintiff to dismiss claims prior to service of an answer or of a motion for summary judgment. In this case, the defendants had both answered and filed motions for summary judgment. Rule 41(a) (2) allows dismissal of a suit by plaintiffs only "upon order of the court and upon such terms and conditions and the court deems proper."

Under the facts of this case, the court does not believe it would be proper to grant plaintiffs' motions to dismiss. The motions are untimely made, having been filed almost three years after the court had ruled on the merits of this case and found against the Plaintiffs.

Accordingly, it is ORDERED that plaintiffs Motion to Reconsider and Vacate Memorandum Opinion is denied, as are all plaintiffs' motions to dismiss. Since the counterclaim by Bank One against Chamness is no longer in the case, and the issue of attorney's fees

has been waived by the defendants, the court will enter final judgment for the defendants in accordance with this order and the Memorandum Opinion and Order of August 24, 1990.

SO ORDERED

SIGNED this 29th day of April, 1993.

/s/_____
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

- Appendix B -

NO. 93-1486
IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,
Appellants,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, and LINDA HILL WIKERT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR THE APPELLANTS
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ATTORNEYS FOR APPELLANTS

NO. 93-1486

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

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Appellees.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies the following list of persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

The following individuals have an interest in the outcome of this appeal:

1. Ronald E. Chamness, Appellant and Plaintiff Below;
2. Rhea Ann Chamness, Appellant and Plaintiff Below;
3. Lisa C. Barfield (formerly Chamness,) Plaintiff;
4. Ronald E. Chamness, Jr., Plaintiff;
5. Holly A. Chamness, Plaintiff;
6. William R. Trione, Appellee; and
7. Alinda Hill Wikert, Appellee.

The following corporations are involved or are concerned with this appeal:

1. Deposit Insurance Bridge Bank, N.A.;
2. Oregon, Inc.; and
3. Bank One, N.A.

The following government agency or agencies are concerned with this appeal:

1. Federal Deposit Insurance Corporation, as receiver for MBank Dallas, N.A.

The following law firms and counsel have been involved or are presently involved in this case:

Law, Snakard & Gambill
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James H. Cheatham
M. Elaine Buccieri
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STATEMENT REGARDING ORAL ARGUMENT

Appellants request an opportunity to make oral argument to the Court. The issues in this case include complex issues regarding the interplay between Texas homestead and bank regulation law, including, but not limited to the D'Oench-Duhme doctrine and 12 U.S.C. §1823(e). These issues have been addressed by the Fifth Circuit Court of Appeals in prior written opinions, and the conflict between the ruling by the District Court in this case and the Fifth Circuit Court's prior rulings compels counsel for Appellant to request oral argument. There are also a number of discovery requests and responses in this case which are the subject matter of a "death penalty" Sanctions Order; to avoid any confusion, Appellants' counsel wish to make themselves available to the Court for clarifications of any such questions.

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ARGUMENT NO. 1 ..... 16b

The District Court erred in granting the FDIC's Motion for Partial Summary Judgment, as neither the D'Oench-Duhme doctrine nor 12 U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

ARGUMENT NO. 2 ..... 20b

The Trial Court erred in entering death penalty sanctions dismissing the appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were therefore deprived of a trial without due process of law.

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CASES

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Bonadventure v. Butler, 593 F.2d 625 (5th Cir. 1979) 27b

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Dorsey v. Academy Moving and Storage,
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Fjelstad v. American Honda Motor Companies,
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Griffin v. Aluminum Co. of America,
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National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam) 27b

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Plywood Antitrust Litigation; French Quarter Apartments, Ltd. v. Georgia, 655 F.2d 627 (5th Cir. 1981) 25b

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The Texas Homestead Protections: A Chink in the Section 1823(e)/ D'Oench, Duhme Armor, 21 Tex. Tech. L. Rev. 104 (1990) 19b

NO. 93-1486

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Appellants,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, and LINDA HILL WIKERT,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR THE APPELLANTS
RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

STATEMENT OF JURISDICTION

The Fifth Court of Appeals of the United States of America properly has jurisdiction over the appeal presented herein pursuant to 28 U.S.C. §1291. The judgment against Appellants was entered on the 29th day of April, 1993, and Appellants timely filed their notice of appeal within thirty (30) days thereafter.

STATEMENT OF ISSUES

1. Did the District Court improperly grant summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas law; and
2. Did the District Court err in entering Death Penalty Sanctions dismissing Appellants' claims?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

This case commenced when Plaintiffs Ronald E. Chamness ("Ronald Chamness"), Rhea Ann Chamness (who is referred to herein with Ronald Chamness as "Mr. and Mrs. Chamness"), Lisa C. Chamness, Ronald E. Chamness, Jr. and Holly A. Chamness (collectively "the Chamness Family") filed an Original Petition in the 134th Judicial District Court of Dallas County, Texas against MBank Dallas, N.A., Oregon, Inc., William R. Trione and Linda Wikert (the "Original Defendants"). The Chamness Family claimed that certain real property and improvements located at 4208 Armstrong Parkway in Highland Park, Texas constituted the homestead of the Chamness Family pursuant to the Constitution of the State of Texas and the statutes enacted thereunder. The Original Petition further claimed that a purported foreclosure of certain deeds of trust against the homestead was void. The Chamness Family claimed the deeds of trust were improper clouds upon the title to the homestead. The Chamness Family also sought damages and attorney's fees.

Subsequent to the filing of the original Petition in state court, MBank, N.A. failed. The Federal Deposit Insurance Corporation ("FDIC") appeared in the case and removed the case to federal court.

The FDIC, in its capacity as receiver, continued its defense against the monetary claims asserted against MBank by the Chamness Family. Deposit Insurance Bridge Bank ("DIBB") entered an appearance as an additional Defendant, apparently the holder of the counterclaim originally asserted by MBank.

While the case was pending before the Northern District of Texas, Dallas Division, the District Court entered a Memorandum Opinion and Order granting a motion by FDIC for summary judgment and motions by FDIC and Defendant Wikert for sanctions pursuant to Rules 16(f) and 37. (This Order is hereinafter referred to as the "Memorandum Opinion".) In the Memorandum Opinion, the District Judge (the Late Honorable Robert W. Porter) ordered that judgment be entered against the entire Chamness Family pursuant to FDIC's Motion for Summary Judgment and that the Family's claims be dismissed pursuant to Rules 16(f) and 37. The Court further directed that proceedings be held to determine attorneys fees to be awarded to all Defendants. Prior to ruling on the attorneys fees requested and entering further orders or a final judgment, Judge Porter died. The Memorandum Opinion marked the beginning of an approximate 30-month period during which no further action was taken by the District Court.

After a replacement District Judge (Honorable Jorge Solis) was appointed to the bench, Mr. and Mrs. Chamness filed motions for reconsideration and vacation of the Memorandum Opinion. Mr. and Mrs. Chamness also sought to dismiss their claims against the FDIC and the MBank related defendants [Oregon Inc., FDIC, DIBB, and Trione]. If granted, these motions would have resulted in a simple suit by Mr. and Mrs. Chamness against Wikert alone, as the purported purchaser of the property. The members of the Chamness Family, other than Mr. and Mrs. Chamness, requested voluntary dismissals of all of their claims.

On April 29, 1993, the District Court denied all of the Chamness Family members' motions, and entered judgment in accordance with the Memorandum Opinion. It is from this judgment that Mr. and Mrs. Chamness now appeal.

B. Statement of Facts.

The following statement of facts is compiled from the uncontested facts appearing from the record in this case and are primarily

drawn from the FDIC's Motion for Partial Summary Judgment. [The Motion and exhibits to the Motion referred to herein, are contained in the appendix to this Brief.]

On May 17, 1979, Ronald Chamness and A. Marlene Chamness purchased two lots in Dallas County, Texas known as Lots 12, 14, Block 103, Highland Park West, Number 1 from the Estate of Florence M. Moss. The street address for this property is 4208 Armstrong Parkway, Highland Park, Texas (the "Armstrong Property"), *Volume 5, Page 25.* Ronald Chamness took possession of the Armstrong Property and proceeded to renovate it in June, 1979. *Id.* From the date Ronald Chamness purchased the Armstrong Property until August 20, 1980, the Chamness Families lived at 6550 Cliffbrook, Dallas, Texas 75240 (the "Cliff brook Property") . *Id.* Ronald Chamness claimed a homestead exemption at the Cliffbrook property, until he moved from it on August 20, 1980. id. The improvements to the Armstrong Property consisted of a dwelling or a house. *Id.* Subsequent to Ronald Chamness purchase of the Armstrong Property and subsequent to the abandonment of the Cliffbrook Property, Chamness granted deeds of trust (which are relevant to these proceedings)[1] against the Armstrong Property as follows:

January 9, 1981 — A Deed of Trust to Curtis Hawley, Trustee, given to secure a guaranty of an unspecified date, and a Note dated December 18, 1980, (owing to Republic National Bank of Dallas] which deed of trust is referred to hereinafter us the "Hawley Deed of Trust." *Vol. 5, pp. 63-69.* Chamness executed a subordination agreement at the time wherein he agreed the property did not "constitute his homestead." *Vol. 5, pp. 105-109.*

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[1] There are other documents contained in the exhibits to the Motion for Summary Judgment filed by FDIC containing homestead "waivers", but since they are irrelevant and remote in time from the Republic, First City and MBank transactions, they are not discussed. FDIC's inclusion of these items demonstrates the breadth FDIC would give D'Oench-Duhme and 12 U.S.C. §1823(e), as these documents related to earlier real estate transactions to which MBank was not even a party.

June 3, 1981 — A Modification to the Hawley Deed of Trust was executed to increase the debt to Republic Bank; *Vol. 5, pp. 75-80;* along with a "NonHomestead Affidavit" whereby any homestead rights in the Armstrong Property were purportedly renounced. *Vol. 5, p. 73.*

June 21, 1983 — A Deed of Trust to Dewaine V. Hill, Trustee, was executed by Chamness to secure a note to First City Bank in the sum of $2,550,000; along with an affidavit the Armstrong property was not Chamness' homestead. *Vol. 5, pp. 8596.* This Deed of Trust is referred to hereinafter as the "Hill Deed of Trust". The proceeds of the Note to First City Bank, secured by the Hill Deed of Trust, paid off the Hawley Deed of Trust Note. *Vol. 5, p. 5.*

March 9, 1984 — A Deed of Trust to Jim Reynolds, Trustee, was executed by Chamness to secure a guaranty in favor of MBank of apparent business debts of CM Mechanical Corporation of $7.5 million. *Vol. 5, p. 97.* This deed of trust is hereinafter referred to as the "Reynolds Deed of Trust." The Reynolds Deed of Trust contained a purported homestead renouncement and disclaimer.

March 8, 1985 — MBank takes an assignment of the Hill Deed of Trust. *Vol. 5, p. 5.*

After granting the deeds of trust described above, Ronald Chamness obligations to MBank came to be in default, and MBank purported to exercise its rights under the Hill Deed of Trust and the

Reynolds Deed of Trust.[2] Foreclosure of the Armstrong Property allegedly occurred on June 3, 1986. *Vol. 1, p. 8.* In that foreclosure, the Armstrong Property was allegedly auctioned by MBank officer, William Trione ("Trione"), to Oregon, Inc. ("Oregon") , an MBank subsidiary. *Id.* The Armstrong Property was then allegedly conveyed by Oregon in a prearranged transaction, on the same day, to Defendant Wikert. *Id. at 8-9.* Thereafter, the Chamness Family commenced this suit, seeking a declaration that the purported foreclosure of the Hill and Reynolds Deeds of Trust had no legal effect, was improper, that the members of the Chamness Family were the rightful owners of the Armstrong Property, and that each were entitled to damages against all Defendants. *Id. at 7-14.*

Subsequent to the filing of the Original Petition, MBank failed and the FDIC removed the proceeding to the District Court. *Vol. 1, p. 1.*

During the pendency of the case, several motions concerning discovery were filed by the parties and discovery was propounded by each side. A more detailed description of the facts surrounding these procedural matters is contained in the *Argument No. 2* section of this Brief. *Infra.*

FDIC filed a Motion for Partial Summary Judgment on the basis that the official MBank files, of which FDIC had taken possession in its capacity as receiver, contained non-homestead declarations, and therefore the D'Oench-Duhme doctrine and 12 U.S.C. §1823(e) barred the Chamness Family's claim of homestead. *Vol. 5, pp. 1-9.* In addition, the FDIC filed a 164 page brief in support of the Motion, where the FDIC's sole argument was that the Chamness suit could not be maintained insofar as the Chamness Family's claims contradicted the official bank file in the FDIC's possession. Additionally, all Defendants filed a motion for sanctions under Federal Rules of Civil Procedure 37 and 16(f). *Vol. 2, pp. 476-479; Vol. 2, pp. 480-488; Vol. 2, pp. 489-496; Vol. 8, pp. 1-11.*

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[2] There is no Summary Judgment evidence that a foreclosure occurred or what liens were foreclosed, this statement is based on the same assumptions made of the District Court. This error is immaterial however since the sole subject of the Summary Judgment granted to FDIC was the global preclusion of homestead rights based on Doench-Duhme and 12 U.S.C. §1823(e).

The Motion for Partial Summary Judgment was granted. The District Court concluded that D'Oench-Duhme and 12 U.S.C. §1823(e) barred all homestead claims by the Chamness Family because such claims contradicted the terms of the documents in the official bank files. *Vol. 3, p. 520.*

The District Court also granted each Defendant's Motion for sanctions, finding:

> that the Plaintiffs have repeatedly engaged in willful and bad-faith conduct: (1) in refusing to adhere to the various deadlines ordered herein, including the submission of a joint pretrial order, and (2) in failing to produce documents responsive to the FDIC's First Request for Production in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by U.S. Magistrate Tolle on 3/12/90. *Vol. 3, p. 524.*

After the Memorandum Opinion was entered, but before further proceedings were had in the case, Judge Porter died. Additionally, during the interim, Mr. and Mrs. Chamness filed a Chapter 7 Bankruptcy case. *Vol. 3, p. 545.* On June 8, 1992, the automatic stay was lifted *(Vol. 3, p. 603),* and on July 2, 1992, 24 days later, Mr. and Mrs. Chamness filed a Motion for Reconsideration and Vacation of the Memorandum Opinion. *Vol. 3, p. 557.* In the Motion for Reconsideration, Mr. and Mrs. Chamness sought relief from the Memorandum Opinion on two grounds: (1) the Fifth Circuit authority published after the entry of the Memorandum Opinion, and other authority, directly conflicted with the legal conclusion in the Memorandum Opinion, that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the assertion of homestead rights against contrary statements in a failed bank's official file; and (2) the death penalty sanction was excessively harsh and not meted out according to Fifth Circuit guidelines. Vol. 3, p. 557. On April 29, 1993, the District Court (Honorable Jorge Solis) denied the motion to reconsider and entered judgment in accordance with the Memorandum Opinion.[3]

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[3] Pursuant to the rule stated in Youmans v. Simon, 791 F.2d 341, 349 (5th Cir. 1986), Mr. and Mrs. Chamness claim error in the memorandum opinion, not the order denying Plaintiff's Motion for Relief from that opinion, although that same error was repeated in the order denying the Motion.

SUMMARY OF THE ARGUMENT

Issue 1. Did the District Court improperly grant summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas Law?

Argument No. 1. The District Court erred in granting the FDIC's Motion for Summary Judgment, as neither the D'Oench-Duhme doctrine nor 12 U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

Issue 2. Did the District Court err in entering the Death Penalty Sanctions against Appellants, on the grounds stated in the Court's order?

Argument No. 2. The Trial Court erred in entering Death Penalty Sanctions dismissing the Appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were therefore deprived of a trial without due process of law.

ARGUMENT NO. 1

Issue No. 1. Did the trial court err in granting summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas Law?

Argument No. 1. The trial court did err in granting the FDIC's Motion for Partial Summary Judgment, as neither the D'Oench-Duhme doctrine nor U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

The Chamness Family suit was brought on the basis that the Family owned, occupied, and used the Armstrong Property as its homestead and that the disclaimers of homestead and non-homestead affidavits executed by **Ronald Chamness** were ineffective. *Vol. 1, p. 8.* It is well established that a homestead cannot be "declared" away by a Texas resident and disclaimers of homestead rights are of no effect, barring additional facts. See In re Niland, 825 F.2d 801 (5th Cir. 1987). In the case at bar the FDIC asserted that MBank's failure was such an additional fact and it filed a Motion for Partial Summary Judgment based **solely** on its claims that D'Oench-Duhme and 12 U.S.C. §1823(e) prohibited the Chamness Family homestead claim. The FDIC's Motion was granted in the Memorandum Opinion, upon which judgment was later entered.

The District Court erred in granting the **sole** defense asserted in the Motion by FDIC for the Chamness Family homestead claim. The District Court applied the D'Oench-Duhme principle [D'Oench-Duhme & Co. v. FDIC, 315 U.S. 447 (1942)] and 12 U.S.C. §1823(e) to prohibit the homestead claim. However, in Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990), an identical case was decided against the FDIC. In Patterson, the Fifth Circuit rejected the FDIC's argument that 12 U.S.C. §1823(e) precluded contradiction of a homestead designation for the reason that a homestead right "exists independent of any agreement between the parties." Patterson, 918 F.2d at 843, *citing with approval,* In Re Howard, 65 B.R. 498, 503 (Bankr. W.D. Tex. 1986) *which relied upon* FDIC v. Bluerock Shopping Center, 766 F.2d 744, 753 (3d Cir. 1985). The Court correctly noted, in Patterson, that D'Oench-Duhme and 12 U.S.C. §1823(e) preclude defenses based on "agreements," not defenses based on facts.

The facts in Patterson (which were much more developed than in the case at bar, insofar as the homestead claimant Jeanne Patterson, was at least afforded a trial) are basically identical to those claimed to exist by the FDIC in the case at bar: (i) a deed of trust had been given a bank to secure a note, (ii) a document containing a statement inconsistent with a later claimed homestead was executed by the homestead claimant and was found by the FDIC in a failed bank portfolio, and (iii) the FDIC sought to enforce the note and deed of trust in slavish respect of the documents in the failed bank's official files. Patterson at 918 F.2d 541-542. The superpowers granted by 12 U.S.C. §1823(e) and the prodigy of D'Oench Duhme were an appealing argument to the trial court in Patterson, as in the case at bar. During trial, Jeanne Patterson was not allowed to present any evidence to the jury that the property in question was used as a homestead. The trial court in Patterson apparently believed that the statements in the failed bank's official file were elevated to the status of dogma by the FDIC superpowers, and that reality was of little or no significance.[4] The Fifth Circuit Court clearly distinguished Patterson's

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[4] Apparently the District Court in the case at bar found these superpowers pervasive as well as powerful, since it held that D'Oench-Duhme and 12 U.S.C. 1823(e) barred not only Ronald Chamness' claims, but those of the entire Chamness Family. Only Ronald Chamness signed a document inconsistent with a homestead claim.

situation from the 'scheme' defenses and agreements, that D'Oench-Duhme and 12 U.S.C. §1823(e) preclude. Patterson 918 F.2d at 543. The Patterson court declared that **claims and defenses based on facts and circumstances existing at the time an instrument was executed in favor of a failed bank are not barred by FDIC superpowers.** Id. at 545. On the other hand, the Patterson court noted that a defense based on an "agreement, scheme, or bank representation" was a defense that the superpowers of the FDIC barred. *Id.* at 545. To illustrate the distinction in Patterson, this Court cited Templin v. Weisgram, 867 F.2d 240 (5th Cir. 1989) cert. denied. In Templin, the Court noted that a side agreement, an agreement between banker and borrower, that a sale of a homestead was a sham, was the type of agreement to which the FDIC superpowers applied "full force." Templin 867 F.2d at 242. In other words, this Court recognized that D'Oench-Duhme and 1823(e) are ineffective as to defenses not dependent upon agreements.

There are other landmark cases which illustrate the distinction noted in Patterson. On the one hand there are the scheme, arrangement, or agreement cases. These cases have one common element not existing in the case at bar - the defense was based on an (i) agreement, (ii) an understanding, or (iii) a communication from or to an agent of the failed financial institution. Examples of this type of defense are evident from a review of this Court's and the Supreme Court's leading cases:

Templin: Homestead claimant's claims depended upon knowledge that purported sale of homestead was a sham. Supra. The first paragraph of the opinion reveals that a borrower, a banker and a third party **agreed** to stage a sale of the homestead, and that it was not to be effective.

Langley: Borrower claimed a defense to suit on a note based on **oral promises** from a bank officer. Langley v. FDIC, 484 U.S. 86 (1987).

D'Oench-Duhme: Borrower had **secret agreement** with bank officer that facially enforceable note would not be enforced pursuant to its terms. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, (1942).

Buchanan: Homestead claim was premised on refuting an **agreement** between homestead claimant and an aluminum siding contractor that a lien was granted before commencement of improvements to homestead when in fact they were not. The agreement be-

tween Buchanan and the contractor was clearly an agreement to enable the contractor to get funds from the failed bank. Buchanan v. FSLIC, 935 F.2d 83 (5th Cir. 1991).

On the opposing shore, defenses based on independent facts, not agreements, schemes, or understandings, survive the FDIC superpowers:

Patterson: Homestead defense "existed" independent of any agreement because of **use of property** by homestead claimant. Supra. at 543.

Texas Refrigeration Supply: Complaints regarding timely acceleration or the disposition of collateral are based on the **nature of negotiable instruments** and are not eliminated by D'OenchDuhme or 12 U.S.C. §1823 (e). In Texas Refrigeration Supply, the entire analysis of the court in making its determination of the applicability of the FDIC superpowers was to distill each claim and defense down to its factual elements and then determine if one element was an agreement with the failed institution or a representation of such institution. Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975 (5th Cir. 1992).

Garrett: Neither D'Oench-Duhme nor 1823(e) prevent claims or defenses which are independent of agreements, such as **breach of duty or negligence** by failed bank. Garrett v. Commonwealth Mortgage Corp. of America, 938 F.2d 591, 595 (5th Cir. 1991).

The pattern and direction of the Fifth Circuit in distinguishing claims and defenses based on agreements, express or implied, from "real" claims of defenses was noted only months prior to the publication of Patterson with uncanny accuracy by Texas Legal Scholars. *The Texas Homestead Protections: A Chink in the Section 1823(e)/ D'Oench, Duhme Armor,* 21 Tex. Tech. L. Rev. 104 (1990).

In the case at bar, the Chamness Family homestead existed because of the Family's actual possession, use, and occupancy of it, not because of any agreement not reflected in MBank's official files. Mr. and Mrs. Chamness were precluded from presenting facts to demonstrate their actual use and occupancy of the Armstrong Property, because it would have conflicted with the official bank file of MBank. This analysis flies in the face of the Fifth Circuit authorities note above. The homestead claim arose because of facts, and was not based on understandings, schemes, representations or agreements. Accordingly,

Mr. and Mrs. Chamness are entitled to proceed to a trial to prove their homestead rights.

ARGUMENT NO. 2

Issue 2. Did the District Court err in entering the death penalty against Appellants, on the grounds stated in the Court's order?

Argument No. 2. The Trial Court erred in entering Death Penalty Sanctions dismissing the Appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were, therefore, deprived of a trial without due process of law.

The record in this case shows that the Chamness Family's lawsuit was dismissed and that they were deprived of the opportunity to present their argument on the merits, for the preservation of their homestead, without any showing of discovery abuse. Instead, a review of the record reflects that the Chamness Family responded to all discovery requests in the time permitted by the rules or the deadlines required by the Court with the exception of a 9 day tardiness in serving answers to interrogatories. There is absolutely no showing in the record of any evidence where any member of the Chamness Family failed to disclose, in response to a discovery request by the Defendants, responsive material in the possession of any member of the Family. The end result was that the Plaintiffs were deprived of a trial on the merits based on the Defendants' aggressive and voluminous mischaracterization of Plaintiffs' efforts to comply with discovery.[5]

The various motions for sanctions filed by the FDIC and Wikert complain of alleged misconduct by the Chamness Family in the following particulars:[6]

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[5] Apparently the FDIC subscribes to a formulation of Immanuel Kant's "categorized imperative" and that all things it thinks exist, in fact do. Accordingly if it thinks a deposition exists it does, and if it tells the trial court that the Chamnesses are "process abusers" enough, the Court believes it, and the Chamnesses therefore are "process abusers".

[6] The record demonstrates that the Defendants engaged in a "Ramboesque" effort to deprive the Chamness family of a trial on the merits by burying them in a mountain of discovery and filing repetitive and redundant complaints concerning the family's good faith efforts at compliance. It should be noted that the First and Second Requests for Production were submitted to Ronald Chamness only.

1. response to the FDIC's first request for admissions;

2. response to the FDIC's first request for production;

3. response to the FDIC's second request for production;

4. answers to FDIC's interrogatories; and

5. pretrial order.

Mr. and Mrs. Chamness will describe their good faith compliance with the discovery requests and pretrial order separately as follows.

1. **First Request for Admissions**

Defendant FDIC served 140 requests for admission on or about March 27, 1989. Vol. *1, p. 121.* The response date for the request for admissions was extended by agreement to May 11, 1989. *Vol. 1, p. 122.* Subsequently, the parties entered into lengthy negotiations, seeking to resolve the Chamness Family's objections to certain requests for admission on the grounds that they sought admissions as to legal conclusions. The Chamness Family's efforts to fully cooperate in responding are detailed in the "Plaintiffs' Suggestions in Opposition to Defendant's Motion to Deem Admissions." *Vol. 2, p. 250.* By September 20, 1989, 121 of the 140 requests had been admitted or denied or the FDIC no longer sought a response because of Chamnesses' objections as to such request. *Vol. 1, p. 251.* As admitted by the FDIC, the parties finally arrived at a "genuine dispute as to interpretation of law" as to 19 requests for admissions, which were submitted to the Court for determination. *Vol. 1, p. 123.* As to those 19 Requests, FDIC specifically agreed not to request sanctions. *Vol. 1, p. 188.* On November 13, 1989, U.S. Magistrate Tolle signed an order which required answers by November 27, 1989. *Vol. 2, p. 272.* Ronald Chamness filed answers on November 24, 1989. *Vol. 3, p. 703.* Thus, by November 24, 1989, all of the requests for admission to which the FDIC sought responses had either been admitted, denied, or objected to in a timely manner. Despite this fact, the FDIC refers to the Responses to Requests for Admission in its motion for sanctions of March 2, 1990. *Vol. 6, p. 1-16.* Again the

FDIC used innuendo and misrepresentations. Later the FDIC again refers to the request for admissions in its motion for sanctions of June 18, 1990 as if they have relevance and establish improper conduct. *Vol. 8, p. 1.*

Because the FDIC had twice referred to the request for admissions in motions for sanctions and because the answers were not contained in current counsel's files, Mr. and Mrs. Chamness' new counsel was misled into believing the admissions had never been answered and therefore submitted answers to requests for admission. *Vol. 2, p. 570.* The FDIC for the first time, then admitted that the first request for admissions had already been answered in November, 1989 and complained of the second answers proposed by Mr. and Mrs. Chamness' new attorneys. *Vol. 3, pp. 599 and 687.* Thus, with regard to the first request for admissions, they were timely answered within the time required by the U.S. Magistrate.

2. First Request for Production

On or about September 13, 1989, the FDIC submitted its first request for production to Ronald Chamness. *Vol. 1, p. 230-335.* This request sought copies of depositions given by Ronald Chamness in various other litigation matters. The request specifically requested depositions given in the Industrial Indemnity v. CM Corp., SPW v. National Mechanical Corp., Arab Bank Ltd. v. CM World, Glaser Leasing v. Chamness, and Firemans Fund Insurance v. Chamness. *Id.* Ronald Chamness timely filed responses and objections to the request on October 9, 1989. *Vol. 1, p. 237.* On or about October 26, 1989, the FDIC then filed a motion to compel production. *Vol. 1, p. 219.* Counsel for the FDIC admitted that the Firemans Fund deposition and the Industrial deposition had been produced. *Vol. 2, pp. 309-310.* On or about March 12, 1990, the Honorable U.S. Magistrate Tolle ordered that the documents responsive to the FDIC's first request for production be produced by March 30, 1990. *Vol. 2, ID. 333.* As demonstrated by the Affidavit of Ronald Chamness, there were no other depositions available to be produced. *Vol. 3, p. 562.* The SPW v. National deposition could not be, with due diligence, located. *Id.* This deposition had no relevance to the issues in this case. *Id.* There were no depositions in either of the two other lawsuits. At no time have the Defendants alleged, and there is no evi-

dence in the record which demonstrates, that there were any additional documents not produced in response to the first request for production. Instead, the Defendants simply built a case with innuendo and mischaracterization, asking for sanctions on grounds that the Chamness Family failed to produce documents. Again this occurred without any evidence that any additional depositions actually existed. The references to the alleged discovery abuse in the various motions for sanctions relating to the first request for production never make clear that the documents which are sought are depositions. Therefore, the implication is that there are documents which Ronald Chamness never produced. The record, on the other hand, clearly demonstrates that Ronald Chamness produced all depositions which existed or could be located within the time required by the Court.

3. Second Request for Production

On or about December 8, 1989, the FDIC served its second request for production. *Vol. 7, p. 1.* This request sought voluminous documents. On or about December 20, 1989, the Chamness Family counsel withdrew because of non-payment of attorneys' fees. *Vol. 7, p. 22.* Despite being pro se, Ronald Chamness timely filed a Motion to Extend Time to Respond to Second Request for Production of Documents. *Vol. 2, p. 301.* On or about January 27, 1990, the Honorable U.S. Magistrate Tolle granted Ronald Chamness pro se Motion to Extend and extended the time to produce the requested documents until February 23, 1990. *Vol. 2, p. 312.* On February 22, 1993, the Ronald Chamness timely filed a pro se Motion to Enlarge Time to Respond to the FDIC's Second Request for Production. *Vol. 2, p. 317.* This Motion explained that there were 20 boxes of documents shipped from his former counsel in Kansas City and sought time to review the documents to ensure that privileged communications were not disclosed. Ronald Chamness' efforts to contact counsel for the FDIC to discuss the timing of the production of documents and evidencing the efforts to timely comply with Magistrate Tolle's orders are contained in a letter to defense counsel from Ronald Chamness pro se. *Vol. 2, p. 325.* On or about March 12, 1990, the Honorable Magistrate Tolle entered an order requiring the documents to be produced by March 30, 1990. *Vol. 2, p. 333.* On or about April 2, 1990, both Defendants FDIC and Wikert inspected all of the documents

responsive to the second request for production. *Vol. 2, p. 477.* There is nothing in the record to reflect that the records were not tendered on or before March 30 and, again by innuendo, the Defendants have recited the date of the actual inspection to cast the Chamness Family in a bad light. It should be noted that the 30th was a Friday and the 2nd was a Monday. The Defendants did not allege that the inspection on the 2nd was not in timely compliance with Magistrate Tolle's March 12 order, but again recite these facts as a basis for sanctions in complete mischaracterization of the events. As of April 2, 1990, the Chamness Family had timely produced all available documents responsive to both the first and second requests for production.

4. Answers to Interrogatories

On or about March 1, 1990, the FDIC forwarded the first set of interrogatories to the Chamness Family. The interrogatories were answered on or about April 12, 1990. *Vol. 9, pp. 34-41.* The complaint by the Defendants was that the answers were 9 days late and were not signed under oath.[7] It is true that the signature is not notarized; however, the paragraph preceding the signature is in substantial compliance with 28 U.S.C. §1746, and arguably in compliance with the rules. In addition, Ronald Chamness, in an effort to be in absolute compliance with all discovery, and after retaining current counsel, filed notarized answers to the interrogatories supplementing the prior answers. *Vol. 3, p. 703.* The only alleged discovery abuse related to the interrogatories was, therefore, that they were not originally notarized.

In addition, the answers to interrogatories were submitted containing general objections to the definitions, as well as objection responses to interrogatories 3, 4, 5 and 6. The objections are not required to be signed by the party, but may be signed by the attorney making them within the meaning of Fed. R. Civ. P. 33(a).

Fed. R. Civ. P. 37(b) provides comprehensively for sanctions for

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[7] The only answers in the record are unsigned, however the Original Answers in Counsel's file are signed and not notarized. Pursuant to Local Rules of the Northern District of Texas, discovery material is not filed and Chamness' former counsel would have been custodian of the original. Defendants would not have received anything but a copy pursuant to such rules. The Rules are silent as to whether the copy is to be signed or not. See, Local Rules of Procedure, Northern District of Texas, Rule 2.2.

failure to obey discovery orders. It has no application if there has not been a court order ... however, many of the sanctions available under 37(b) are incorporated by reference in Rule 37(d) with regard to interrogatories do not apply when the failure to comply is anything less than a total failure to respond. Fox v. Studebaker Worthington, 516 F.2d 989, 994-995 (8th Cir. 1975) [Citations and other discussions omitted]. In other words, Rule 37(d) sanctions are proper only when there has been a complete or nearly total failure of discovery. Fox v. Studebaker Worthington, at 995. It should be noted however, that under appropriate circumstances, evasive and incomplete, answers to interrogatories can be tantamount to no answers at all. Plywood Antitrust Litigation; French Quarter Apartments, Ltd. v. Georgia, 655 F.2d 627 (5th Cir. 1981).

The answers and objections given by the Plaintiffs here were not evasive. The Defendants failed to file a motion to compel and there is no order compelling more complete, sworn answers to the interrogatories or disobedience of such order. In fact Ronald Chamness' objections were never ruled upon or otherwise addressed. There is, therefore, no basis for determining that Ronald Chamness' answers constitute "no answer" to discovery which would justify the imposition of death penalty sanctions to the entire Chamness Family.

5. Pretrial order

On or about October 4, 1989, the Honorable Court required a pretrial order be submitted by June 22, 1990. The Chamness Family and Defendants filed Pretrial Orders although, not pretrial orders signed by both parties. *Supplemental Transcript.* The factors relating to the submission of a separate pretrial orders are described in the FDIC's Motion for Sanctions. *Vol. 3, pp. 662-663, 671-673.* Apparently, the Defendants submitted their version of a pretrial order because Plaintiffs' counsel had not contacted them by June 20. *Vol. 3, p. 672.* To the extent that the submission of a separate pretrial order was the basis for the sanctions, the record reflects no fault on behalf of the Chamness Family and only arguable fault by their counsel. "Finally dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client..." Batson v. Neal Spelce Associates, 765 F.2d 511, 514 (5th Cir. 1985). There is absolutely no evidence that the Chamness Family, then represented

by counsel, refused to cooperate with their attorney regarding the preparation of the pretrial order, or that there was any prejudice resulting from the failure to have all parties' signature on the two pretrial orders submitted.

Legal Authority

> The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of production order when the failure was "due to inability fostered neither by its own conduct nor by circumstances within its control. [The Rule] should not be construed to authorize dismissal because of noncompliance of a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any other fault of petitioner."

Dorsey v. Academy Moving and Storage, 423 F.2d 858, 860 (5th Cir. 1970) (Citing Societe Internationale Pour Participations Industrielles Et Commercicales, SA v. Rogers, 357 U.S. 197, 211-212 (1958).

The Fifth Circuit has set out the factors to be considered by the Court in determining what sanction is appropriate under Rule 37:

> But we have also recognized that dismissal is too harsh a sanction where a number of factors, singly or in combination, are present, or where the District Court's relevant findings of historical fact are clearly erroneous. First, dismissal is to be sparingly used and only in situations where its deterrent value cannot be substantially achieved by the use of less drastic sanctions. Whether the other party's preparation for trial was substantially prejudiced is a consideration. Dismissal is generally inappropriate and lesser sanctions are favored where neglect is plainly attributable to an attorney, rather than to his blameless

> client. Nor does a party's simple negligence grounded in confusion or sincere misunderstanding of the Court's orders, warrant a dismissal. Finally, the Rule "should not be construed to authorize dismissal when it has been established that failure to comply is due to inability."

Marshall v. Segona, 621 F.2d 763, 767-768 (5th Cir. 1980) (Citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)).

> "Although our task in reviewing a sanction imposed under Rule 37(b) is to determine whether the district judge abused his discretion in ordering the sanction, we have noted before that a district judge should use the draconian remedy of dismissal with prejudice only in extreme circumstances." Griffin v. Aluminum Co. of America, 564 F.2d 1171, 1172 (5th Cir. 1977). "Deliberate, repeated refusals to comply with discovery orders have been held to justify the use of this ultimate sanction." See also, Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Durgin v. Graham, 372 F.2d 130 (5th Cir. 1969) [cert. denied 389 U.S. 941 (1969)].

Bonadventure v. Butler, 593 F.2d 625 (5th Cir. 1979) [Bracketed cite history inserted].

"Although the District Court's discretion under Rule 37 is broad, we have repeatedly emphasized that it is not unlimited, and we have often characterized the dismissal with prejudice as a Draconian remedy, or a remedy of last resort only to be applied in extreme circumstances." Batson v. Neal Spelce Associates, 765 F.2d 511, 515 (5th Cir. 1985). The Court in Batson reversed the District Court's dismissal with prejudice, and noted the absence in the record of any consideration by the District Court of whether a less drastic action than a dismissal with prejudice would have furthered the important deterrent aspect of Rule 37. Id. at 516. It should be noted that in Batson, the matter was remanded to the District Court. The District Court once again dismissed with prejudice, after making express findings that lesser sanctions were not appropriate. This order was affirmed by the

Fifth circuit in Batson v. Neal Spelce Associates, 765 F.2d at 546.

"A district court 'Abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions.'" Olivia v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992) Citing U.S. v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986). The Ninth Circuit Court of Appeals, in reversing a *sua sponte* dismissal by a district court stated that, "[n]othing in the record demonstrates that counsel was on notice that the case would be dismissed. "Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal." Id. at 274. Admittedly, the facts of the Olivia decision concern the court's sua sponte dismissal of a case in the absence of a motion to dismiss. The Ninth Circuit, however, has stated three factors in determining whether or not a district court has considered alternatives to dismissal:

> "(1) did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) did the Court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?"

Malone v. United States Postal Service, 833 F.2d 128, 132 (9th Cir. 1987) cert. denied 488 U.S. 819 (1987). There is absolutely no discussion in Judge Porter's order, or anywhere in the record, of any consideration or discussion of alternatives to the sanction of Dismissal being considered or discussed.

The Ninth Circuit Court has stated five leading factors to be considered by a trial court in determining whether or not to dismiss a case for failure to comply with a court order.

> A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order; '(l) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.' 'It is not necessary for a

> district court to make explicit findings to show that it has considered these three factors.'

Malone v. United Postal Service, 833 F.2d at 130. Citing Thompson v. Housing Authority, 782 F.2d 829, 832 (9th Cir.), cert. denied, 107 S.Ct. 12 (1986) and Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

A similar standard for review on Rule 37 sanctions is set forth in the Fifth Circuit opinion of Fjelstad v. American Honda Motor Companies, 762 F.2d 1334 (5th Cir. 1985):

> The District Court's 'discretion will not be disturbed unless we have a definite and firm conviction that the Court committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's noncompliance must be due to willfulness, fault, or bad faith. Id. at 1337 Citing U.S. v. Sumitomo Marino and Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980). The constitutional basis of the limitations on the use of death penalty sanctions has been recognized by the Fifth Circuit. "Due process limits the imposition of the severe sanctions of dismissal or default to extreme circumstances in which the deception relates to the matters in controversy and prevents their imposition merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." Fjelstad 162 F.2d at 1338.

A recent article in the Texas Bar Journal fully discusses the Constitutional limitations on the "death penalty" sanctions.

> "A case of the Fifth Circuit, Bonair Hotel, Inc. v. Time, Inc., captures the Constitutional sensitivity of the United States Supreme Court with regard to the death penalty sanctions, and holds that the dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances."

Soules and Wallace, Discovery Death Penalty Sanctions Reviews, De Novo Standard 55, Tex. B.J. 135 (1992). "Fairness demands the severe sanction of default may not be imposed under Rule 37(b)(2) in the absence of willfulness, bad faith or fault." Fjelstad at 1340.

> As we have demonstrated above, the discretion of a district court to award sanctions and render judgment based on those sanctions is quite broad. That discretion is bounded at its outer limits, however by constitutional due process concerns.

Frame v. S-H, Inc., 967 F.2d 194, 204 (5th Cir. 1992); See also *USA Const., Amend. V.*

SUMMARY OF ARGUMENT NO. 2

The draconian measure of sanctions dismissal without warning was not warranted in the case at bar for any reason. The sanction was an abrogation of the Chamness Family's constitutional and procedural rights, which were not warranted by the conduct of any member of the Family. The sanction was imposed without the common law safeguards announced in this Court's decisions. The dismissal should be reversed.

CONCLUSION

The District Court erred in this case in two respects. First, it exclusively applied the superpowers granted to the FDIC and used them to defeat the homestead claim of the Chamness Family.

Secondly, the District Court entered the ultimate sanction deprivation of the right to trial - without adhering to the procedural requirements established by the Fifth Circuit Court of Appeals. The Chamnesses pray the Court order that the judgment be set aside, that the Memorandum Opinion be vacated, and that this case be remanded for trial in the District Court.

Respectfully submitted,

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The undersigned hereby certifies that two true and correct copies of this Brief and one copy of Appellants' Appendix/Record Excerpts were served on the 16th day of July, 1993, via hand delivery, upon

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Supreme Court, U.S.
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(3)

No. 93-1573

In the Supreme Court of the United States

OCTOBER TERM, 1993

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS
RECEIVER FOR MBANK DALLAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals can affirm a grant of summary judgment by relying on one of the several alternative legal theories on which the district court relied in granting summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unpublished, but the judgment is noted at 9 F.3d 1546 (Table). The opinions of the district court (Pet. App. D1-D14; App., *infra*, 1a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on January 4, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on April 4, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, while living in a house located at 6550 Cliffbrook in Dallas, Texas, petitioner Ronald E. Chamness and his late wife Marlene Chamness purchased a house located at 4208 Armstrong Parkway in Highland Park, Texas.[1] In 1980, while living in the Cliffbrook home, Chamness[2] obtained a $1 million loan to renovate the Armstrong property, secured by a deed of trust encumbering that property. To obtain the loan, he executed an affidavit stating that the Armstrong property "does not constitute any part of [Chamness's] business or urban homestead, and the [Armstrong property] is not claimed or designated by him as homestead property." By the end of 1981 Chamness had obtained two additional loans from Republic National Bank to renovate the Armstrong property, for $1.5 million and for $937,500; petitioner executed similar affidavits in connection with those loans. At about the same time, Chamness sold the Cliffbrook home and began claiming his Cedar Creek house in Henderson County, Texas as his homestead. Pet. App. A2-A3, C3-C4, D3-D4.

In June of 1983 Chamness renewed and extended the sums he owed on the Republic promissory notes by

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[1] Our statement of the facts is drawn from the opinion of the court of appeals, which apparently relied on the materials submitted in support of the FDIC's motion for partial summary judgment (Pet. App. C1-C10), to which petitioners did not respond in the district court.

[2] References to Chamness are to Ronald E. Chamness individually.

executing a note payable to First City Bank of Dallas in the amount of $2,550,000. In the deed of trust securing his obligation to repay that note, Chamness again represented that the Armstrong Property was not and had not constituted his homestead; he also executed another non-homestead affidavit. In March of 1984, Chamness executed another deed of trust encumbering the Armstrong property, in which he again expressly renounced any homestead claim to that property. Pet. App. A3, D4.

In March of 1985, the note and deed of trust were assigned from First City to MBank Dallas, N.A. After Chamness defaulted on the promissory note, William Trione (the trustee under the deed of trust), foreclosed on the Armstrong Property. Oregon, Inc. purchased the property at the foreclosure sale and subsequently conveyed title to Linda Wikert. Pet. App. A3.

2. In 1988, petitioners (Chamness and his late wife), together with several other relatives who could have had an interest in the Armstrong property if it had been Chamness's homestead, filed suit in a Texas court against MBank, Oregon, Inc., Trione, and Wikert, claiming that Chamness still owned the property and that the foreclosure was improper, based on the contention that the property had been his homestead. MBank filed a counterclaim against petitioner for fraud and for collection on the balances remaining unpaid on the note. Pet. App. A3-A4.

3. On March 28, 1989, the Comptroller of the Currency declared MBank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for MBank. Acting in that capacity, the FDIC intervened and removed the case to federal

district court. See Pet. App. A4, D3.[3] In December of 1989, the FDIC filed a motion seeking summary judgment on all of petitioners' claims. *Id.* at A4; see *id.* at C1-C10 (reprinting motion). The motion, supported by various affidavits, exhibits, and responses by petitioners to requests for admission, alleged that all of the documents in the records of the institution at the time it failed (which included the documents outlined above in which Chamness expressly disclaimed any homestead interest in the Armstrong property) indicated that petitioners had no homestead interest in the Armstrong property. *Id.* at C6-C7. The motion contended that the FDIC's submissions raised the question "[w]hether [petitioners] are entitled to assert home stead [*sic*] defenses to lien claims in spite of written representations that the property at issue was not homestead." *Id.* at C7. The brief supporting the motion argued that the question should be answered in the negative, based on this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and on 12 U.S.C. 1823(e) (Supp. IV 1992).

Petitioners did not respond to the motion or to document discovery requests made by the FDIC. When petitioners failed to comply with the discovery requests even after six extensions of time granted by the district court, the FDIC filed a motion for sanctions pursuant to Fed. R. Civ. P. 37. See Pet. App. A4. At that point, the district court issued an opinion granting summary judgment and sanctions

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[3] The Deposit Insurance Bridge Bank, subsequently known as Bank One, also became a party to the case because it acquired various assets and liabilities of MBank from the FDIC as receiver.

dismissing petitioners' claims. Pet. App. D1-D14. The court reasoned that the "applicable loan documents are facially valid," and "that *D'Oench, Duhme*, §1823(e) and other law overrides the homestead protection upon which [petitioners] base their claims." Pet. App. D12. On the question of sanctions, the court explained "that [petitioners] have repeatedly engaged in willful and bad faith conduct * * * in failing to produce documents responsive to the FDIC's [document request] in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by [a magistrate judge]." *Id.* at D13.

Petitioners filed a motion to reconsider, arguing that the district court had erred in relying on *D'Oench, Duhme* to bar their homestead claims and that dismissal was an excessive sanction for their misconduct. See App., *infra*, 3a. The district court denied that motion. *Id.* at 1a-9a.[4] The court explained that "[u]nder Texas law, someone who represents that certain property is not his homestead and he [*sic*] is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property." *Id.* at 4a. The court noted that the FDIC's summary judgment submission included "five documents that [Chamness] executed on four different dates * * * represent[ing] that the property in question is not his homestead," and that in several of the documents he stated under oath that he was not residing on the property. *Ibid.* Because

[4] Because the opinion of the district court rejecting the motion to reconsider is not appended to the petition, we reprint it as an appendix to this brief.

petitioners did not controvert the accuracy of those documents in response to the FDIC's motion for summary judgment, the court concluded that petitioners were "estopped as a matter of law from asserting their homestead claim." *Id.* at 4a-5a. After reviewing the misconduct on which it had relied to justify the sanction of dismissal, the court reaffirmed the finding that "dismissal of [petitioners'] claims was the appropriate sanction." *Id.* at 8a.

4. The court of appeals affirmed. Pet. App. A1-A7. The court first addressed the homestead issue. On that point, the court noted that, because petitioners "failed to respond to the summary judgment motion, despite repeated extensions of time[, the court] must assume as true the facts alleged by the [FDIC]." *Id.* at A6. Accepting those facts as true, the court agreed "with the district court that the homestead claims asserted by [petitioners] were barred under Texas homestead law, which provides that a claimant has no homestead protection if he represents that the property is not his homestead at a time when he is not actually occupying the property." *Ibid.* Accordingly, the court declined to consider whether the district court also was correct in holding that petitioners' claims should be dismissed under *D'Oench*, *Duhme* and Section 1823(e), Pet. App. A6, or as a sanction for discovery abuse, Pet. App. A7.

ARGUMENT

Petitioners do not challenge the accuracy of the Fifth Circuit's conclusions regarding Texas homestead law. Rather, they argue (Pet. 3-12) that the Fifth Circuit's disposition of the case based on undisputed principles of Texas law constituted an erro-

neous grant of summary judgment to the FDIC on a new legal theory to which petitioners did not have an adequate opportunity to respond. As is clear from the Statement above, that argument rests on an inaccurate description of the proceedings in the lower courts.

Contrary to petitioners' conclusory allegation (Pet. 2), the court of appeals did not rely on an "entirely new" legal theory as a basis for rejecting petitioners' attempt to disavow Ronald Chamness's sworn statements regarding the nature of his interest in the Armstrong property. The district court had concluded that the FDIC was entitled to summary judgment for three discrete reasons: (a) estoppel under Texas homestead law, see App., *infra*, 4a-5a; (b) the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e) (Supp. IV 1992), see Pet. App. D10-D12; and (c) petitioners' discovery abuses, see Pet. App. D12-D14. The court of appeals appropriately disposed of the appeal by addressing a single ground that it found adequate to support the judgment of the district court.

Petitioners therefore err in suggesting (Pet. 11-12) that the court of appeals denied petitioners due process. As for the district court's decision to grant summary judgment on a ground not explicitly advanced by the FDIC, and to grant summary judgment to an additional party who did not seek summary judgment, this Court has recognized that it is proper for a district court to grant summary judgment *sua sponte* as long as the losing party has an adequate opportunity to present evidence to support its position. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). The FDIC's motion for summary

judgment gave adequate notice to petitioners that they needed to provide support for their homestead claims when it raised the question "[w]hether [petitioners] are entitled to assert home stead [*sic*] defenses to lien claims in spite of written representations that the property at issue was not homestead," Pet. App. C7. Petitioners' obdurate noncompliance with the discovery and summary judgment processes in the district court puts them in no position to complain about being given an inadequate opportunity to address the legal questions presented by the FDIC's defenses to their claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1994

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:89-CV-1117-P

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR., AND HOLLY A. CHAMNESS, Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT, Defendants

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[Filed Apr. 29, 1993]

ORDER

On August 24, 1990, Judge Robert Porter signed a Memorandum Opinion and Order in which he ruled on the motions for summary judgment of Defendants Federal Deposit Insurance Corporation (FDIC), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., and William R. Trione and motions for sanctions of these defendants and defendant Alinda Hill Wikert. Judge Porter held that the D'Oench-Duhme doctrine precluded the claim of homestead asserted by Plain-

tiffs in this case and granted summary judgment for all defendants except Alinda Hill Wikert. Judge Porter also granted all of the defendants' motion for sanctions and ordered that all of Plaintiffs' claims be dismissed with prejudice against all defendants. Judgment was not entered pending the judge's ruling on the issue of attorneys fees on which the parties were to submit affidavits. At the time of entry of the Memorandum Opinion and Order, judgment would have been partial because of one of the defendants had a counterclaim pending against plaintiff Ronald E. Chamness. That counterclaim has apparently now been discharged in bankruptcy. (see motion of Ronald E. and Rhea Ann Chamness to Dismiss their Claims against Defendants William Trione and Oregon, Inc).

On July 23, 1991, and prior to Judge Porter's ruling on attorneys fees, plaintiffs Ronald E. and Rhea Ann Chamness filed for bankruptcy. The bankruptcy stay was lifted on June 8, 1992. Subsequent to the lifting of the bankruptcy stay, plaintiffs Ronald and Rhea Ann Chamness filed a Motion to Reconsider and Vacate Judge Porter's Memorandum Opinion and Order of August 24, 1990 and a motion to dismiss their claims against defendants FDIC, Oregon, Inc. and William Trione. Plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness, and Lisa C. Chamness filed motions to dismiss all of their claims as to all defendants. In response, the defendants filed motions opposing the motion to reconsider, opposing the dismissal of any of the plaintiffs' claims without prejudice, and motions to strike and objecting to late filed discovery responses of plaintiffs. The late filed discovery responses is [*sic*] an apparent attempt by plaintiffs to correct some of the conduct for which Judge Porter

imposed sanctions in his Memorandum Opinion and Order of August 24, 1990.

For reasons set forth below, the court denies plaintiffs Ronald E. and Rhea Ann Chamness' motion to reconsider and motion to dismiss defendants FDIC, Oregon Inc. and William Trione, and denies plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness and Lisa C. Chamness' motions to dismiss their claims.

MOTION TO RECONSIDER

In their motion to reconsider, plaintiffs advance two main arguments. First, that the August 24, 1990, order is in error because it incorrectly applied the D'Oench-Duhme doctrine to preclude plaintiffs' homestead claim. Second, that dismissing the case as an imposition of sanctions was improper because there was no discussion in the order of the consideration of any lesser sanction and, a review of the record reveals that the extreme sanction of dismissal was inappropriate.

In support of their first argument, plaintiffs cite the case of *Patterson v. FDIC*, 918 F. 2d 540 (5th Cir. 1990) as an "identical case that was decided against the FDIC." In the *Patterson* case, the court held 12 U.S.C. § 1823(e) was not "so broad as to override the Texas Homestead Laws ... we hold that under the facts of this case, § 1823(e) does not preclude Patterson from attempting to prove her homestead under Texas law.", [*sic*] *Patterson*, at 545. Defendants counter that *Patterson* is inapposite because it involved 12 U.S.C. § 1823(e) and not the D'Oench-Duhme doctrine and cite the case of *Buchanan V. FSLIC*, 935 F. 2d. 83 (5th Cir. 1991) [*sic*] where the court held that the D'Oench-Duhme

doctrine could preclude assertion of a homestead claim. Defendants also argue that plaintiffs are estopped from asserting their homestead claim because at the time that plaintiffs executed the affidavit of Non-Homestead, they were not occupying the residence in question.

The court finds that on both of their arguments, the defendants are correct. Under Texas law, someone who represents that certain property is not his homestead and he [*sic*] is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property. As part of its motion for partial summary judgment, the FDIC submitted the affidavit of C.C. Prudhomme III, an employee of Bank One, Texas, formerly known as Deposit Insurance Bridge Bank. Attached to this affidavit are five exhibits (A-E) which are copies of five documents that plaintiff Ronald E. Chamness executed on four different dates. In each of these documents, Chamness represents that the property in question is not his homestead. Exhibit B is a Non-Homestead Affidavit executed by Chamness on June 3, 1981. In it Chamness states, under oath, that "He does not now reside upon" the property in question. Exhibit D is an affidavit executed by Chamness on June, [*sic*] 21, 1983. In this affidavit Chamness states, under oath, that he purchased the property in question in May, 1979, and began extensive renovation work on it in June, 1979. In paragraph three of that affidavit, Chamness states that the property "was not ready for occupancy until August 20, 1991, and was not occupied." This summary judgment evidence has not been controverted, and was accepted by Judge Porter as undisputed in his Memorandum Opinion and Order of

August 24, 1990. The Homestead Affidavit dated June 11, 1980, and the Non-Homestead Affidavit dated June 3, 1981, were executed by Chamness when he was not residing in the property in question. The plaintiffs are, there-fore, estopped as a matter of law from asserting their homestead claim. *Patterson*, supra., [*sic*] and cases cited therein.

Additionally, in *Buchanan*, supra., [*sic*] the court stated that in determining whether D'Oench applied to bar a party's claim, the applicable test was whether the party "lent himself to a scheme or arrangement whereby the banking authority on which the FDIC relied in insuring the bank was or was likely to be misled." Under that test, the court looks at the "relative culpability of the party making the claim." *Buchanan*, supra., [*sic*] at 85. It is clear from the evidence recited above that the plaintiffs have lent themselves to a scheme to mislead the banking authorities, and are now precluded, under the D'Oench-Duhme doctrine, from asserting their homestead claim against the defendants.

Plaintiffs also seek reconsideration of Judge Porter's decision to dismiss all of plaintiffs' claims as an imposition of sanctions. The Fifth Circuit has stated that dismissal of a case as a sanction will be upheld where there is a showing of "a clear record of delay or contumacious conduct by the plaintiff and when lesser sanctions would not serve the best interests of justice." *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154 (5th Cir. 1985). In summary, the record in this case reveals that plaintiffs have failed to produce documents in response to two Requests for Production of Documents filed by the FDIC. In particular, the record with respect to the First Request for Production is illuminating with respect

to plaintiffs' conduct in this case. That request was filed on September 13, 1989. On October 26, 1989, the FDIC filed a Motion to Compel. Various negotiations ensued between the parties and the motion to compel was not heard. Plaintiffs' counsel was allowed to withdraw by Magistrate Judge Tolle by order dated December 20, 1989, but Judge Tolle informed the parties that his order did not "extend the dates upon which responses to outstanding discovery requests must be made." Nevertheless, the documents were not produced, and on February 21, 1990, the FDIC sent Chamness a letter requesting that he produce the documents requested. On March 2, 1990, the FDIC filed its second Motion to Compel. On March 12, 1990, after a hearing, Judge Tolle ordered plaintiffs to produce the documents by March 30, 1990. At the hearing, Judge Tolle told Chamness personally that no more extensions of time would be forthcoming. On March 27, 1990, plaintiffs filed another motion for extension of time seeking more time to file a response to defendants [*sic*] motion for partial summary judgment and to extend the discovery and scheduling deadlines. This was plaintiffs' seventh motion for extensions of time. After a hearing on April 2, 1990, the motion was denied by Judge Tolle. In his order denying plaintiffs' request for more time, Judge Tolle stated, "Plaintiffs have shown nothing which would justify further delay in this case. Plaintiffs have repeatedly asked for extensions of time to file required responses and to extend scheduling deadlines, and this Court has repeatedly granted those requests. At a hearing on March 12, 1990, the undersigned magistrate once again granted Plaintiffs' request for extension of time, but advised Plaintiff Chamness personally that no further

extensions of time would be forthcoming." Judge Tolle's order of March 12, 1990, ordering production of the documents by March 30, 1990, was not complied with, and on April 9, and May 18, 1990, the FDIC sent letters to plaintiffs requesting production of the documents. As of the date of Judge Porter's Order of August 24, 1990, plaintiffs had still not complied with Judge Tolle's order.

The record also shows that plaintiffs had not complied with Judge Tolle's order of March 12, 1990, that documents be produced by March 30, 1990, pursuant to the FDIC's Second Request for Production of Documents filed on December 8, 1989. Additionally, plaintiffs failed to comply with Requests for Admissions, and Interrogatories were answered nine days late and were not answered under oath.

By order dated October 4, 1989, Judge Porter required the parties to submit a joint Pre-Trial Order by June 22, 1990. By motion of March 27, 1990, plaintiffs sought to have that deadline extended. The motion was denied by Judge Tolle in his order of April 2, 1990, but plaintiffs failed to participate in the preparation and submission of a joint Pre-Trial Order.

Plaintiff also failed to file any response to the defendants' motions for summary judgment, even though the time for filing responses was extended twice.

Finally, in his Memorandum Opinion and Order of August 24, 1990, Judge Porter noted that plaintiffs had not filed responses to two motions for sanctions filed by the FDIC in June, 1990, nor to two motions for sanctions filed by defendant Wikert also in June, 1990. These motions for sanctions were the basis for

the dismissal of plaintiffs' claims by Judge Porter. In their July 28, 1992, Motion to Reconsider, plaintiffs, for the first time, challenge the motions for sanctions filed by the defendants. This is over three years after the motions were filed by defendants and almost three years since Judge Porter entered his Memorandum Opinion and Order.

Judge Porter found that plaintiffs had "repeatedly engaged in willful and bad faith conduct" with respect to meeting deadlines and court orders and with respect to discovery. After a review of the record, this court agrees with those findings and with the finding that dismissal of Plaintiffs' claims was the appropriate sanction.

Plaintiffs' Motions to Dismiss

Plaintiffs' Ronald E. Chamness and Rhea Ann Chamness seek dismissal of their claims against defendants FDIC, Oregon, Inc., and William Trione. Plaintiffs Ronald E. Chamness, Jr., Lisa C. Chamness, and Holly A. Chamness move to dismiss all of their claims as to all defendants. Rule 41(a)(1), Fed. Rules Civ. Proc., allows a plaintiff to dismiss claims prior to service of an answer or of a motion for summary judgment. In this case, the defendants had both answered and filed motions for summary judgment. Rule 41(a)(2) allows dismissal of a suit by plaintiffs only "upon order of the court and upon such terms and conditions as the court deems proper."

Under the facts of this case, the court does not believe it would be proper to grant plaintiffs' motions to dismiss. The motions are untimely made, having been filed almost three years after the court had

ruled on the merits of this case and found against the Plaintiffs.

Accordingly, it is ORDERED that plaintiffs [*sic*] Motion to Reconsider and Vacate Memorandum Opinion is denied, as are all plaintiffs' motions to dismiss. Since the counterclaim by Bank One against Chamness is no longer in the case, and the issue of attorneys fees has been waived by the defendants, the court will enter final judgment for the defendants in accordance with this order and the Memorandum Opinion and Order of August 24, 1990.

SO ORDERED.

SIGNED this 29th day of April, 1993.

/s/ Jorge A. Solis

JORGE A. SOLIS
United States District Judge